



EU agricultural policy and the negotiation of an FTA

Daugbjerg, Carsten; Hussey, Karen ; Tidemann, Carl

Published in:
Understanding EU Trade

Publication date:
2018

Document version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Daugbjerg, C., Hussey, K., & Tidemann, C. (2018). EU agricultural policy and the negotiation of an FTA. In A. Elijah, & T. Baker (Eds.), *Understanding EU Trade: A Guide for Stakeholders* (pp. 17-19). Australian National University.



Australian
National
University



Co-funded by the
Erasmus+ Programme
of the European Union



UNDERSTANDING EU TRADE: A GUIDE FOR STAKEHOLDERS

Edited by Annmarie Elijah and Tom Baker

The Australian National University Centre for European Studies, 2018



Australian
National
University



Co-funded by the
Erasmus+ Programme
of the European Union

UNDERSTANDING EU TRADE: A GUIDE FOR STAKEHOLDERS

Edited by Annmarie Elijah and Tom Baker

The Australian National University Centre for European Studies, 2018

The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein. © ANU Centre for European Studies, 2018

CONTENTS

Contributors	5
Abbreviations	7
Introduction	8
<i>Annmarie Elijah and Tom Baker</i>	
EU–Australia: a global alliance for trade	9
<i>Cecilia Malmström</i>	
Intellectual property: main demands in EU trade treaties	13
<i>Hazel V J Moir and Wenting Cheng</i>	
EU agricultural policy and the negotiation of an FTA	17
<i>Carsten Daugbjerg, Karen Hussey and Carl Tidemann</i>	
Agri-food trade and Brexit	20
<i>Alan Swinbank</i>	
Trade in automotive goods	23
<i>Ayden O'Neill</i>	
Trade in services	26
<i>Deborah Elms</i>	
Investment issues in the context of the Australia–EU FTA	29
<i>Ivana Damjanovic</i>	
Trade and sustainable development chapters in EU trade agreements	34
<i>Maria Garcia</i>	
Brexit and regulatory cooperation in the Australia–EU FTA	38
<i>Pierre van der Eng and Donald Kenyon</i>	
Glossary	42
Appendix: Industry aims in relation to an Australia–EU FTA	44

CONTRIBUTORS

Tom Baker is a research assistant at The Australian National University (ANU) Centre for European Studies, where he was previously an intern as part of the Australian National Internships Program. Tom holds a Bachelor of International Relations from ANU, and his research focuses on trade policy in the EU. In 2017 he completed a research project on behalf of the Centre on 'The interests of the Australian agricultural industry in relation to the Australia–EU free trade agreement'.

Wenting Cheng is a Visiting Fellow at the ANU Centre for European Studies, has a PhD from the School of Regulation and Global Governance (RegNet) in the ANU College of Asia and the Pacific. Prior to joining RegNet, Wenting was a researcher at the Development and Research Centre of State Intellectual Property Office (SIPO) of China, a think tank directly affiliated with SIPO. At the centre, she participated in over 20 research projects and submitted policy briefs related to China's intellectual property laws, policies and national strategies, especially focusing on patents. Wenting holds an LL.M. degree from Peking University and an LL.B degree from Shanghai International Studies University.

Ivana Damjanovic is a PhD candidate at the ANU Centre for European Studies. Her research is interdisciplinary, encompassing issues of law and politics in the area of investor-state dispute settlement (ISDS) within the context of the European Union (EU). Ivana is a Croatian and Australian lawyer. She has academic and practical experience in both common law and civil law jurisdictions, and expertise in international law and international relations. She holds multiple degrees and has won several prizes for her academic achievements as a law student in Australia. Currently she holds an Australian Government Scholarship for her PhD research project. Ivana's professional background encompasses nine years as a successful career diplomat for the Government of Croatia, with diplomatic postings in Europe and Australia, as well as research and policy roles for the Ministry of Foreign Affairs, where she worked on Croatia's accession to the EU. Ivana has worked as a sessional lecturer in law at the University of Canberra (UC) and teaches law at UC's offshore programs in Asia.

Carsten Daugbjerg is Professor in the Department of Food and Resource Economics at The University of Copenhagen. His field of research is comparative public policy, specialising in agricultural policy reform, trade negotiations in the WTO, public and private food standards in global trade, government interest group relations and environmental policy. His publications include *Ideas, Institutions and Trade: The WTO and the Curious Role of EU Farm Policy in Trade Liberalization* (Oxford University Press, 2009).

Annmarie Elijah is Associate Director of the ANU Centre for European Studies. She holds a PhD from the University of Melbourne which examined Australia, Britain and Europe during the British bids for European Community membership. She was a policy officer in the Australian Department of the Prime Minister and Cabinet between 2002 and 2006. Annmarie's research focuses on Australia–EU relations, regional economic integration, comparative regionalism, federalism and trade policy. She recently co-edited a book on Australia–EU trade relations (ANU Press, 2017). She was successful in securing EU research funding through the 2016, 2017 and 2018 Erasmus+ Jean Monnet Activities, including a Jean Monnet Centre of Excellence on EU–Australia Economic Cooperation. In 2017 she was a recipient of the ANU Vice-Chancellor's Award for Public Policy and Outreach for her work on Brexit and the Australia–EU trade negotiations.

Deborah Elms is Founder and Executive Director of the Asian Trade Centre. She is also a Senior Fellow in the Singapore Ministry of Trade and Industry's Trade Academy. Previously, she was head of the Temasek Foundation Centre for Trade & Negotiations (TFCTN) and Senior Fellow of international political economy at the S. Rajaratnam School of International Studies at Nanyang Technological University, Singapore. Her research interests are negotiations and decision-making, and her current research involves the Trans-Pacific Partnership (TPP), Regional Comprehensive Economic Partnership (RCEP), ASEAN Economic Community (AEC) negotiations and global value chains. Deborah received a PhD in political science from the University of Washington, an MA in international relations from the University of Southern California, and bachelor's degrees from Boston University.

Maria Garcia is a Senior Lecturer in Politics, Languages and International Studies at the University of Bath. Prior to joining Bath in 2014, Maria was a Marie Curie International Fellow at the NCRE, University of Canterbury (New Zealand) and the University of Nottingham. Maria's current projects include a book on the divergent free trade agreement strategies of large (China, USA, EU) and small economies (Singapore, Chile, New Zealand) in Asia-Pacific and their effects on the development of future economic governance in the region. Alongside Annick Masselot of the University of Canterbury, Maria is investigating Asian resistance to European norm promotion through free trade agreements. Her research interests are international trade and economic governance; EU–USA trade negotiations (TTIP) and Trans-Pacific Partnership negotiations (TPP); EU–Asia, EU–China, EU–Australasia and EU–Latin America relations; regional integration and inter-regionalism; and values and trade.

Karen Hussey is Professor and Director of the Centre for Policy Futures at The University of Queensland. Trained as a political scientist, Karen undertakes research in the field of public policy and governance, with a particular interest in public policy relating to sustainable development. Her recent research has focused on water and energy security, the role of the state in climate change mitigation and adaptation, the links between international trade and environmental regulation, and the peculiarities of public policy in federal and supranational systems.

Don Kenyon is Associate Professor and Visiting Fellow in the ANU Centre for European Studies. During 1993–96 he was Australian Ambassador to the GATT and WTO in Geneva and during 1997–2000 Ambassador to the European Union, Belgium and Luxembourg. He was a senior trade negotiator for the Australian Government with many years of experience in bilateral and multilateral trade negotiations and retired from the Australian Department of Foreign Affairs and Trade in October 2001.

Hazel Moir is an Adjunct Associate Professor in the ANU Centre for European Studies where her work focuses on the 'intellectual property' dimensions of possible trade agreements, including with the European Union. Her academic background is in economics (Cambridge) and demography (Brown). After brief stints in the private sector and in overseas aid, she spent 20 years in the Australian Public Service and followed this with a second PhD in public policy. Hazel has made a number of submissions to government enquiries into aspects of patents, copyright and trade policy. More recently she has led a Jean Monnet project on geographical indications.

Ayden O'Neill is a research assistant at the ANU Centre for European Studies. He was formally an intern at the Centre as part of the Australian National Internships Program. He holds two bachelor degrees in International Relations and Arts and recently completed honours at the ANU School of Politics and International Relations. His research focuses on international trade and populism in the European context.

Alan Swinbank is Emeritus Professor of Agricultural Economics at the University of Reading. He is Past-President (2009–10) of the Agricultural Economics Society (UK). His research has focused on farm and food politics of the EU, particularly its Common Agricultural Policy and, more recently, bioenergy and the process of trade liberalisation in these products. His publications include the co-authored *Feeding the British Public: A Centenary Review of Food and Drink Manufacturing* (Reading, 2014).

Carl Tidemann is a PhD candidate in the Fenner School of Environment and Society at ANU, where he completed a first class honours thesis entitled 'Addressing carbon leakage in climate policy: A synthesis and assessment of the strengths and weaknesses of key policy responses'.

Pierre van der Eng is Associate Professor in the College of Business and Economics at ANU. He is an economist and historian with interests in business history and international business, as well as economic history and development economics. His current research interests include aspects of business development and company organisation, particularly the management of political imperatives and liability of foreignness by continental European firms in Australia.

ABBREVIATIONS

CAP	Common Agricultural Policy
CETA	Comprehensive Economic and Trade Agreement
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GIs	geographical indications
IP	intellectual property
IPR	Intellectual Property Rights
ISDS	investor-state dispute settlement
MFN	most favoured nation
MRA	mutual recognition agreement
NTB	non-tariff barrier
OECD	Organisation for Economic Co-operation and Development
SME	small and medium enterprise
SPS	sanitary and phytosanitary
TBT	technical barriers to trade
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTMRA	Trans-Tasman Mutual Recognition Arrangement
UK	United Kingdom of Great Britain and Northern Ireland
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organization

INTRODUCTION

Annmarie Elijah and Tom Baker

In November 2015, Australian Prime Minister Malcolm Turnbull, together with European Commission President Jean-Claude Juncker and President of the European Council Donald Tusk, agreed to pursue a trade agreement between Australia and the European Union (EU). As this guide goes to print the European Commission and the Australian Department of Foreign Affairs and Trade have finalised the second round of negotiations in Canberra. The proposed trade deal follows the Australia–EU Framework Agreement, a treaty-level political deal which sets the parameters for bilateral cooperation. The relationship is widely acknowledged to be in a sweet spot.

For the EU, the prospective deal fills one of the few gaps on a global map where the EU does not already have trade arrangements in place. Bilateral trade agreements reflect the *Global Europe* trade strategy since 2006 and are conducted in line with the *Trade for All* principles. For Australia the deal reflects the importance of EU trade in the overall trade figures and the conviction that trade agreements can ultimately contribute to trade liberalisation, especially in the absence of multilateral progress.

The EU is Australia's second largest trading partner and the total value of trade in goods and services between the two is almost A\$70 billion. EU imports into Australia account for over two-thirds of this amount. Major Australian imports from the EU include motor vehicles, medicaments and pharmaceuticals. Primary Australian exports to the EU are gold and coal. Trade in services is an increasingly important part of the relationship, valued at nearly A\$33 billion. Foreign direct investment (FDI) is also significant.

Trade and economic issues between Australia and the EU have historically been a source of tension. The proposed deal offers the chance to increase trade flows and provide new opportunities across various sectors. It would also be a significant diplomatic outcome. Australia and the EU share a commitment to the international rules-based order and multilateral trade, as the speech included here from EU Trade Commissioner Cecilia Malmström highlights.

This stakeholder guide has been put together following a series of EU Trade training sessions across Australia. It draws on the collective wisdom of academics associated with an Erasmus+ Jean Monnet project entitled *Understanding EU Trade*, which was specifically designed to raise awareness and understanding of the EU, its institutions and trade policy in Australia as the trade negotiations progress. Contributors draw attention to different aspects of the negotiations, outlining issues and challenges for EU and Australian policymakers. The guide covers intellectual property, agricultural policy, Brexit, the automotive industry, services, investment, sustainable development and regulatory cooperation. It includes a transcript of EU Trade Commissioner Cecilia Malmström's Schuman Lecture at ANU in June 2018. Further, it incorporates a summary of the submissions so far made to the Australian Department of Foreign Affairs and Trade on the potential impact of the trade agreement. It is clear that stakeholders see both potential and pitfalls in the prospective deal.

Trade policy documents are often complex and highly technical. This collection is deliberately as accessible as possible. It is hoped that Australian stakeholders from industry, government and non-government organisations will find it a useful tool for understanding EU trade and the implications of the proposed trade agreement for Australia.

EU–AUSTRALIA: A GLOBAL ALLIANCE FOR TRADE

Cecilia Malmström, European Commissioner for Trade – Speech given at The Australian National University, Canberra, June 2018

I am very happy to be here today. Thank you very much to The Australian National University for inviting me. I am honoured to join an illustrious list of European speakers such as:

- > Vice-President of the [European] Commission, Leon Brittan
- > Secretary-General of the EEAS [European External Action Service], Helga Schmid, and
- > my fellow Scandinavian, Commissioner Connie Hedegaard.

Indeed, it is important that Australians and Europeans seek to understand each other. Australia and Europe have always been intertwined. It is easy to see the connection when you look at our history—starting with the first landings of Dutch, Portuguese, British and other sailors on Australian shores; the ANZAC battalion fighting in the First World War, and again in World War II.

More recently, 2017 was a major milestone in our relations: the EU–Australia Framework Agreement was signed—a comprehensive statement of our shared values, underpinning our close history and our economic, political and cultural ties. But little did we know that the most important, momentous step in EU–Australian relations was still to come—a move that would prove controversial. Some questioned whether it was possible, let alone geographically justifiable. But 3 years on, they are proven wrong. I am, of course, referring to Australia’s admission to the Eurovision Song Contest in 2015! And it proved to be a success.

The next step in strengthening our relations will be a trade agreement. And today I want to tell you about why this trade agreement is important. They are important economically, politically and strategically.

A changing world

Both Australia and the EU recognise that the world is changing. A lot of these changes are for the better—poverty is at an all-time low, child mortality has plummeted, and the number of democratic nations is the highest it has ever been.

But with achievements come challenges: threats to the environment, global conflict and mass urbanisation to name a few. And then, of course, we have the rapid speed of globalisation. In the 20th century, the Western world was dominant. We were in this position because we harnessed science and technology, but now as this knowledge becomes ubiquitous things are changing. In the coming years, the vast majority of global growth will occur outside the West. And the dominance of the West is already being transformed by the increasing importance of the Asia-Pacific region, as you know well. The EU knows it too—and the leadership of The Australian National University know it. Just recently, Vice-Chancellor Schmidt and Dean Wesley recommended to expand courses in Asian languages, politics, history and economics. This university has always been renowned for its Asia and Pacific Studies, and an effective actor in engaging graduates and the Australian economy with Asia. This is how universities and students adapt to global shifts. It is clear that countries must adapt too—the question is how.

Some expect developing countries to give up their pursuit of a better life. But we cannot force growing countries to abandon their ambitions. This is short-sighted and morally unjustifiable. We need an approach that is practical, intelligent and fits our values. The way the EU does this is by opening up and cooperating with other countries. In this way, we seek to build mutually beneficial relationships, establish global rules, and enforce them to the benefit of global order.

This is how we plan to establish ourselves in the 21st century. But not everyone agrees with us—some would rather close up in the face of these challenges; they want to hide behind borders and cut themselves off. But we do not agree with this.

Open–Closed

Indeed, in recent years many have observed a new political divide. The 21st century is no longer simply defined as ‘Left versus Right’. It is still there and very important in politics. In the face of globalisation, a new axis on the political compass has been added: ‘Open versus Closed’. The turn of the century saw the financial crisis, the Great Recession, and the migrant crisis.

Some pointed to globalisation as the cause of these challenges. As a result we saw very important political shifts: Brexit, the US election, even the French presidential election. You might see this in Italy as well now. These were all fought along the lines of ‘Open versus Closed’.

On the ‘Open’ side we continue to believe in liberal democracy and free trade. We look beyond our borders for prosperity, cooperation and wealth. We believe in open trade and open societies. Indeed, the Nordic model is often considered the epitome of ‘Open’ politics, and the Australian model too. Whereas in the past Britain and the US were Australia’s most important partners, Australia is always seeking new opportunities. Now, with a forward-looking trade policy, four out of five of Australia’s top trading partners are Asian. This openness extends beyond simply free trade in goods and services. It is openness to ideas, innovation, people, investment and change. It comes from the belief that these things make our societies stronger.

On the ‘Closed’ side they are in favour of building walls instead of bridges. They want to isolate themselves from the rest of the world. Often this is in pursuit of an imaginary past. It is an understandable reaction in many ways—we live in a complex world. That is intimidating for many.

But globalisation is happening, and not everybody is a winner. The world is interconnected in an unprecedented way—and Europe in particular. A car can be built with a German design, in a Mexican factory, with an American chassis and an Australian engine. These links are not undone easily, and undoing them will not solve anything. In fact, they will complicate matters even further. Hiding from challenges is not the way forward.

Australia–EU Trade Agreement

The EU responds to these challenges and opportunities. We do that through cooperation and also through trade. We have a heavy trade agenda in Asia. And we want Australia to be part of it. For the EU and Australia, there is a lot to gain from further cooperation. As it stands, our bilateral trade amounts to €46 billion each year.

And this is the situation without favourable access to markets like Australia’s other partners. An agreement between us would boost this further—by about a third according to estimates. Even as we speak there are minerals, wine and machinery leaving Australian ports for Europe. On the way they will be passing containers with cars, cameras and cheese on their way from the EU.

With an agreement in place we could increase this kind of trade while lowering prices for consumers. And it is not just trade in goods and services, it is of course investment too. The EU is the largest investor in Australia.

There are many reasons the EU seeks closer ties with Australia. Not only are you among the fastest-growing developed economies, but we also believe in the same values. We both have high standards in labour and we care about the environment. We believe in health and consumer protection. These standards do more than just protect people—your sanitary standards help preserve your unique biodiversity.

We want smart, sustainable and inclusive growth. And we are committed to open, fair and well-regulated markets. All of our agreements these days include chapters that include these topics. They are called Trade for Sustainable Development chapters. They uphold and promote our values in the world, protecting the environment, labour rights and human rights.

By coming together in trade negotiations, that I was happy to launch today with Prime Minister Turnbull and Minister Ciobo, the EU and Australia are sending a signal that:

- > we are open, outward-looking traders with busy negotiating agendas
- > we are not giving into the politics of fear and closing
- > we believe in a rules-based multilateral system and well-regulated markets, and
- > we stand against uncontrolled liberalisation, unilateralism and the temptation of protectionism.

Circle of friends

And as the list of countries standing up for fair, open and rules-based global trade is growing, we form an even bigger circle of friends. You can tell by looking at the EU's recent trade agenda. We have concluded an agreement with Japan. It not only eliminates tariffs, but includes specific provisions on topics like corporate governance, small and medium enterprises, and doing away with costly non-tariff barriers to trade.

Our deal with Canada is now in force. It is a progressive agreement with a strong Trade and Sustainable Development chapter. It commits us and Canadian friends to high standards in human rights, transparency, environmental protection and labour rights.

We have upgraded a very old agreement with Mexico to the point where it is basically a new agreement—an agreement for the 21st century, that includes topics like intellectual property and services, and it reflects our values, with our first-ever chapter on anti-corruption.

Elsewhere in Latin America we are negotiating with the four countries of Mercosur. We are making good progress in these negotiations, and we are working intensely, but we need a bit more time. We do not want a fast deal at the expense of a good deal. If trade is going to work, it needs to work for everyone.

Our list of agreements now includes Singapore and Vietnam too. We are in the process of negotiating agreements with other ASEAN member states. And soon we will have a deal with Chile. Trade and society at large are changing, and we want our agreements to reflect that. Trade needs to work for everyone, and everyone should feel that trade is working for them.

Every negotiation concluded sends a message to the world. The EU and its partners are coming together to shape globalisation, stand up for open trade, and agree on a rule book that works for everyone.

And we will need many allies to help us in pursuing these goals, right now.

Multilateralism

So we have a very busy bilateral negotiating agenda, just as Australia does. We still believe that the World Trade Organization (WTO) is the fairest and best system for trade. It is also the best way to secure our long-term interests in global trade. A strong, rules-based approach to global trade stands against protectionism, ensures a fair environment for all businesses to operate in, and creates prosperity by opening up markets worldwide.

This has been extremely important for developing countries. But the system is currently threatened—and we need to stand up for it.

We need to reform the system and address the longstanding transparency problems. We must fill the gaps in the current rule book, in particular to address level playing field issues. And we need to make sure that one or two countries cannot block initiatives in the WTO. The EU has already taken the lead on some matters, to see how we can reform different areas of the WTO.

The multilateral investment court initiative is moving forward—more and more countries are interested in it. We want to create a fairer and more transparent dispute settlement system for foreign direct investment. And in the field of e-commerce, we have 80 countries that want to cooperate further to have global rules in this area. Australia is a leader in pushing this agenda forward.

Many in the international community are looking to both the EU and Australia these days. We are building consensus to move forward with these reforms. We are very worried that the challenges to the WTO are compounded by recent US actions. They undermine the WTO. For instance, the US is now blocking nominations to the Appellate Body. We need for the WTO dispute settlement system to work—without it, WTO rules are meaningless.

The EU, Australia and the US have all been frequent clients of this system, and it has served us well.

US and China relations

We are concerned by many of the recent US moves on trade, for instance on steel and aluminium, as they compound the problem. The tariffs on steel and aluminium are an illegal move and threaten to destabilise the WTO. Also, it is frankly ridiculous that EU steel is considered a threat to US national security. As longstanding allies of the US we were disappointed.

We did everything we could to avoid this situation, but now we have no choice but to respond. The EU has a responsibility to stand up for open global trade. Our response is proportionate, reasonable and intelligent.

We have taken this issue to the WTO already. And in a few days' time, we will put rebalancing measures in place on a range of US products.

We hope that our partners in the US will soon see again that trade can be a win-win. The rise of others does not mean our decline. As more parts of the world get richer, we can all benefit. In pursuit of this, multilateral rules are an opportunity, not a hindrance.

We should all be working together to encourage China to take up its responsibilities at the WTO. If they want to be considered a global player, they need to be a member of the global community. Rights come with responsibilities. The more that China and others take up these responsibilities, the stronger the multilateral system will become. And if we can guarantee the multilateral system, we can guarantee a stable future.

Conclusion

The world is changing. Both Australia and the EU need to be ready for that change. At home we can do that by moving up global value chains, and cooperating with partners to bring about new opportunities. On the global stage we can do it through building a solid, rules-based system that is fair and works for everyone.

We believe that the EU and Australia can be partners in this. We have shared values, a progressive worldview and a global outlook. That makes us natural partners. We can support each other and learn from each other, and the progressive trade agreement that we launched negotiations for today will be the next natural step in this. I see great possibility in these negotiations, and we want to progress as quickly as possible.

References and further reading

European Commission (2018), EU-Australia: A Global Alliance for Trade. Speech by European Commissioner for Trade, Cecilia Malmström. Available at http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156953.pdf.

ANUCES (Australian National University Centre for European Studies) (2018), Schuman Lecture Series. Available at <http://politicsir.cass.anu.edu.au/centres/ces/highlights/schuman-lecture-series>.

INTELLECTUAL PROPERTY: MAIN DEMANDS IN EU TRADE TREATIES

Hazel V J Moir and Wenting Cheng

Both the EU and the USA demand increased monopoly protections in the intellectual property chapters of trade treaties. What distinguishes EU from US demands is geographical indications (GIs). GIs are about how names that refer to specific regions can be used when labelling agricultural and food products.

To a lesser extent the EU also demands longer and stronger monopoly rights for the use of clinical trial data for new medicines. Such 'data protection' provisions are separate from patent monopolies, though both are used to delay the entry of generic medicines into a market. US demands on data protection for biologic medicines were a sticking point in the Trans-Pacific Partnership (TPP) negotiations. The EU demands longer and stronger 'protections' (monopolies) for all medicines in its initial draft for the Australia–EU trade agreement.

This chapter covers both issues.

Just what are GIs?

Provisions governing when geographic names can be used to label and market wines, spirits and foods were first introduced in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which formed part of the bundle of treaties that established the World Trade Organization. Article 22 simply states that countries must provide legal means to prevent any use of geographic names that misleads the public or constitutes unfair competition.

But what constitutes misleading use or unfair competition? The EU argues that a label that says, for example, 'brie-style cheese from Gippsland' is misleading and consumers will think they are buying French cheese. Countries like Australia, New Zealand and the USA disagree—all have descendants of European migrants who brought their cultures and foods with them. In these countries words such as brie, feta and asiago indicate a style of cheese not a place of origin, and are therefore considered to be generic. The EU says no.

The EU was successful in negotiating stronger GI provisions for wines and spirits in TRIPS. Article 23 says that one may not use a place name even when accompanied by a clear identification of origin or qualified by expressions such as '-kind', '-type', '-style' etc. This stronger prohibition on place names for wines and spirits was grandfathered—if a producer had been using such a name (e.g. Burgundy) for at least 10 years, they could continue doing so. In fact, the EU has been able to persuade 26 countries to sign bilateral wine agreements in which countries voluntarily agree to the Article 23 standard. In the case of Australia's agreement, the EU offered improved access to the EU wine market in exchange for giving up names that were generic in Australia but not in Europe. The Australian wine industry saw this as a reasonable bargain.

What does the EU want now?

In its current trade negotiations the EU seeks to extend the more stringent provisions of TRIPS Article 23 to all foods. But there is no easy bargain to be made for products such as cheese and meat as there was for wines and spirits. The EU is not offering improved market access, and dairy industry representatives in both Australia and New Zealand are strongly opposed to the EU's GI demands. Indeed, the dairy industry is extremely concerned that EU treaties with countries such as Korea will impact negatively on Australia, reducing Australian cheese exports to Korea.

This seems to suggest a major difficulty for the forthcoming trade negotiations, as GIs are often presented as a 'make it or break it' issue by the EU.

Putting EU GI demands in perspective

However, the outcome of the Canada–EU Comprehensive Economic and Trade Agreement (CETA) suggests a way through. In CETA, Canada agreed that it would provide the stronger (Article 23) style of ‘protection’ for 171 geographic names listed in an Annex to the Treaty. Most of the names listed are highly specific—for example, Brie de Meaux not Brie. What is most interesting for Australia’s dairy and meat industries are the exceptions that Canada carved out.

In theory Canada agreed to provide strong GI protection (no qualifiers) to the five cheeses Asiago, feta, fontina, Gorgonzola and Munster. However, all existing producers can continue to use these names in perpetuity, and if they sell their business the new owner can continue to use the names in perpetuity. Further, if a new producer commences to make, for example, Asiago, they can use the name Asiago with a qualifier (e.g. -like, -style). There are similar, but less generous, continuity provisions for three kinds of meats.

Consideration of Australia’s trade in cheese also suggests that any difficulties on GI negotiations need not be a major issue. In 2016, Australia imported cheese to the value of US\$447 million—just 1.7% of global cheese imports. The bulk of Australia’s cheese imports are from New Zealand (45%) and the USA (15%). Almost all the remainder (40%) is from Europe, with Italy dominating. Australian cheese exports were valued at US\$654 million—2.5% of global cheese exports. Australia’s cheese export markets are Japan (43%), China (11%) and other Asian countries (27%). Less than 2% of Australia’s cheese exports go to Europe—principally to Malta and the Netherlands.

These data suggest that European countries already sell substantial volumes and values of cheese into Australia. Australian consumers are very familiar with the pattern of Australian generic names and specific products from various European countries. It is hard to see how stronger name protection for European cheeses would increase sales of European cheeses in Australia.

In terms of Australian cheese exports, the major concern is competition with European cheeses in Asian markets. Here, however, it is important to look at just what kinds of cheeses Australia sells overseas. Australia’s main cheese exports are cheddar, mozzarella and cream cheese—none of these are covered by EU GI registrations so will not be affected by any EU treaties with Asian countries.

But might GIs be good for Australia?

The EU claims that GIs not only reduce consumer confusion—as suggested above a questionable allegation—but they also raise incomes for rural producers and contribute to regional prosperity. The Australian National University Centre for European Studies (ANUCES) has been investigating this claim over the past year and has compiled a report drawing together all the empirical evidence on these two questions. While there are cases where GIs are associated with higher producer income, there are also cases where they are not. There are substantial difficulties in measuring the impact of GIs on net producer income. But the case study data do not provide any systematic evidence that GIs, in themselves, lead to increased incomes in rural areas.

Certainly farmers can gain higher incomes if they find a strategy for moving up the value chain and differentiating their products from those of other producers. There are many ways to do this and a scheme that regulates labelling is only one method. The evidence clearly indicates that GIs will not work until a reputation has been established for a high-quality product. At this stage a producer might find it simpler and easier to register a trademark and use this to build reputation.

Sui generis ‘protection’ or certified trademarks?

The EU would also prefer Australia to move away from a trademark system for registering GIs. Under Australia’s current trademark system, proposals for a certification trademark (GI) must be scrutinised by the Australian Competition and Consumer Commission. This ensures that proposed GI rules are scrutinised for unnecessary anti-competitive elements before they are registered. The EU’s stand-alone (*sui generis*) GI registration system

has no such protections. Examples such as the United Kingdom's Melton Mowbray Pork Pie GI raise serious questions in this regard.

One reason the EU wants a *sui generis* system is to shift the costs of enforcement from the beneficiary of the 'protection' to the taxpayer. Australia has no culture of GI registrations—in late 2018 there were a handful of registered certified trademarks (GIs) for foods, mostly Italian. There were just two registrations for Australian food GIs.

Why not just agree as part of a bundle?

Since the Uruguay Round trade deals have been done as bundles. This means that countries agree to many provisions that are not in their interests to gain other provisions that do benefit them, or segments of their economies. This is how TRIPS was agreed. TRIPS is about monopolies and restraints of trade, not about competition and free trade, and does not rightly belong in a trade treaty at all. Similarly, while there is little evidence, outside the wine industry, that GIs play an important role in rural prosperity, countries such as Canada have accepted these as part of the overall price of a trade deal. But the EU is considering extending GIs well beyond the agricultural sector, and implications of such an extension are unknown. Certainly Australia should not go further than Canada in 'protecting' GI names. And it would be well worth defending the current registration system, particularly its provisions to minimise the use of GIs for anti-competitive purposes.

Protection for test and other data

Test data refer to data relating to a drug's quality, safety and efficacy, as well as to its physical and chemical characteristics. These data are required by national authorities for the purpose of approving new pharmaceutical products for sale in a national market. As such, they are an essential step in developing a new medicine. A controversial issue concerning test data regulation is use of the data by a third party (often a generic company) for marketing approval for generic products. Data protection/data exclusivity treats test data as a type of intellectual property bearing a right of exclusivity for a certain period.

The USA, EU and Switzerland tried to introduce data protection into TRIPS but failed. However, TRIPS does require data used to gain approval for marketing pharmaceuticals or agricultural chemicals to be protected 'against unfair commercial use'. Of course, many countries see the use of such data for approval of generic products as entirely fair. When the 20-year patent on the medicine runs out, then generics should freely enter the market. Further, it would be unethical to require repeat clinical trials when the results are already known. The European Medicines Agency has been trying, since 2012, to extend public access to clinical trial data. Since TRIPS the USA and the EU have been successful in extending data exclusivity requirements in their bilateral trade agreements.

The EU has had an '8+2+1' model for data protection since 2004. No applications for marketing approval using the test data can be submitted during the first 8 years from marketing approval of the original medicine. This contrasts with Australia's 5 years. Further in the EU, approval for marketing cannot be given until 2 years after the approval request using the test data is filed (this is the +2, making a total wait period of 10 years). Finally, there is a further 1-year wait period for new therapeutic uses identified during the original 8-year exclusivity period. In Australia, data protection is not available for new uses—only for medicines with new active components.

Australia's objective in the Australia–EU FTA negotiation is to maintain the current level of data protection—5 years for medicines with new active ingredients. This objective was clear in the TPP negotiations: the USA originally proposed 12 years data exclusivity for biologics, but the final version of the TPP provides 8-year data exclusivity for biologics or for an option of 5 years and other (unclear) measures. This compromise was reached because of objections from Australia and New Zealand. Since the USA withdrew from the TPP, all provisions related to data exclusivity have been suspended.

The EU is proposing that Australia adopt its "8+2+1" model. Given the great gap between the objectives of the EU and Australia, data protection may be a critical issue in the negotiation of the Australia–EU trade agreement.

References and further reading

Moir, Hazel V.J. (2015), *EU Trade Treaties and Geographical Indications*, ANUCES Policy Notes, 2. Available at http://politicsir.cass.anu.edu.au/sites/default/files/docs/ANUCES-Policy-Notes-2015-2_0.pdf.

Moir, Hazel V.J. (2015), *European Trade Treaties: Key Intellectual Property Demands*, ANUCES Briefing Paper, 6:4, December. Available at http://politicsir.cass.anu.edu.au/sites/default/files/docs/ANUCES_Briefing_Paper_6-4_rev_2016_pdf.pdf.

Moir, Hazel V.J. (2017), 'Geographical Indication: An Assessment of EU Treaty Demands', In Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 121-138), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and>.

Harris, Tony, Dianne Nicol & Nicholas Gruen (2013), *Pharmaceutical Patents Review Report*, Chapter 8 (data protection), Canberra. Available at https://www.ipaustralia.gov.au/sites/g/files/net856/f/2013-05-27_ppr_final_report.pdf.

Török, Áron & Hazel V.J. Moir (2018), *Understanding the real-world impact of GIs: A critical review of the empirical economic literature*, ANUCES Briefing Paper, 9:3, July. Available at http://politicsir.cass.anu.edu.au/sites/default/files/docs/2018/7/Briefing_Paper_GeographicalIndications_Vol.9_No.3.pdf.

EU AGRICULTURAL POLICY AND THE NEGOTIATION OF AN FTA

Carsten Daugbjerg, Karen Hussey and Carl Tidemann

Introduction

The European Union's (EU) Common Agricultural Policy (CAP) has been at odds with the international trading regime since the early 1960s as it took form as a highly protectionist policy. The CAP explicitly sets out to ensure a fair standard of living for the agricultural community and price support became the main tool to achieve this. Prices were maintained at a relatively high level within the internal EU market by applying high variable import levies. High prices combined with significant productivity gains in the European farm sector led to surplus production in the 1970s and 1980s. To maintain the politically established minimum prices, produce had to be removed from the internal market. This was done by stocking surplus products and by subsidising exports. The EU's extensive use of export subsidies caused trade conflicts and contributed to driving down world market prices, hurting farmers in other countries, not least in Australia. This brought the issue of agricultural trade into the world trade negotiations in the mid-1980s and led to a series of reforms of the CAP, making it much less trade distorting. In this chapter we outline the developments in the CAP, the Australia–EU relationship in agricultural trade, and the prospects of reaching meaningful concessions for the agricultural sector in a free trade agreement (FTA) between Australia and the EU.

The Common Agricultural Policy

In the farm trade negotiations under the General Agreement on Tariffs and Trade (GATT) Uruguay Round, running from 1986 to 1994, the EU was under immense pressure to reform its agricultural policy. Eventually, the farm ministers in the EU realised that the CAP had to be reformed to avoid a collapse of the Uruguay Round which included other trade areas in which the EU had significant interests. In 1992, minimum prices were reduced by a third in the arable and red meat sectors, and farmers were compensated for the income loss by direct payments linked to farmed area (on the condition that certain crops were grown) and livestock numbers. This enabled the EU to agree to reduce export subsidy expenditure by a third and subsidised export volumes by a fifth. The EU variable import levies were transformed into tariffs and on average reduced by 36% and bound. This implied that the CAP was less trade distorting than previously.

During the World Trade Organization's (WTO) Doha Round, which commenced in 2001, the EU was again under pressure to reform the CAP but this time negotiations did not have to reach a point where collapse loomed before the EU realised that further changes were necessary. In 2003, most of the direct farm payments were decoupled from the requirement to grow certain crops or keep certain types and numbers of livestock. This meant that the payments no longer maintained production and would not influence what the farmer would decide to grow. Instead, payments became linked to what became dubbed cross-compliance—that is, the farmer is required to comply with environmental, animal health and welfare, and food safety regulations to remain eligible for support. The mini-reform of 2008 further decoupled direct payment, but this was essentially rolled back in the 2013 mini-reform which introduced additional environmental measures as a condition for receiving direct farm payments.

This series of reform means that the CAP is now much less trade distorting than previously. The EU's use of export subsidies has been minimal since 2008, and farm support to much lesser extent drive up or maintain production. However, high tariffs remain in the red meat, dairy and sugar sectors, which within the EU are considered sensitive farm sectors. Support measures with these sectors have not fully been aligned with the changes in the arable sectors. The tariffs applied effectively prohibit imports; only on preferential terms do imports take place.

Prospects of an FTA between Australia and the EU

As a competitive supplier of sugar, beef and dairy, Australia might aspire to the inclusion of these products in an

FTA with the EU. Yet, given the political sensitivity of these commodities, EU producers can be expected to object and there will be pressure on EU negotiators to have these three sectors excluded from an FTA. However, the FTA that the EU agreed with Canada (CETA) granted increased access for Canadian (hormone free) beef to the EU market in return for protection of EU Geographical Indications (GI) in Canada and increased market access for European cheese. Hence, CETA indicates that the EU may be willing to trade off limited market access in sensitive agricultural commodities for recognition of its GIs and increased market access for some selected EU products. In the case of an Australia–EU FTA, those products might well include pork and special cheeses. But there is a limit to such market opening. As former EU Farm Commissioner Ciolos has acknowledged, ‘the EU capacity to absorb additional concessions in the beef sector is limited’.

A more promising line of enquiry for trade liberalisation in agricultural trade between Australia and the EU may lie in the area of non-tariff barriers (NTBs). These can be divided into technical and non-technical measures and they are regulatory in nature (WTO 2013: 25). Technical measures include standards relating to human, animal and plant health (covered by the agreement on sanitary and phytosanitary measures); rules for product weight, size or packaging; ingredient or identity standards; mandatory labelling; shelf-life restrictions; and import testing and certification procedures. Non-technical measures include bureaucratic restrictions, subsidies or other legal measures that hinder trade, such as failure to provide adequate and effective intellectual property protection (Nathan Associates 2013: 2). Both types may have legitimate purposes, especially in the eyes of enforcers, but both can also be misused to covertly impede trade.

The WTO’s agreements on sanitary and phytosanitary measures and technical barriers to trade do allow countries to adopt appropriate measures to protect human, plant and animal health, but to reduce compliance costs and minimise disputes, countries are encouraged to base their domestic technical regulations or standards on those developed by a number of different international organisations. If the number of bilateral special trade concerns raised in the WTO is any indication of the level of NTBs used by countries, then the EU and Australia have much to gain by exploring opportunities for regulatory cooperation. Somewhat ironically, the fact that both the EU and Australia impose comparatively stringent regulations on imports suggests that they may have more in common than either side cares to admit.

Increasingly, NTBs reflect public policy objectives and consumer preferences and they therefore raise issues of far greater complexity than tariffs. The following issues all impede trade to varying degrees on either side of the relationship:

- > customs surcharges
- > high level of food and safety standards resulting in high sanitary and phytosanitary measures that are more stringent than international standards or that are not relevant to the exporting environmental conditions
- > long and difficult authorisation procedures
- > labelling requirement laws
- > direct and indirect government support through tax relief and concessions or protective legislation to EU farmers
- > traceability and labelling of biotechnology foods
- > maximum limits on mycotoxins for a variety of foodstuffs (including cereals, fruit and nuts), and
- > product process, production or labelling requirements relating to the classification of ‘organic’ foods.

An oft-suggested method of overcoming these barriers is mutual recognition of regulations in exporting and importing countries. Mutual recognition across different regulatory jurisdictions assumes an equivalence of regulatory and public policy goals across jurisdictions but accepts that there are differences in regulatory approach or detail in how those goals are met; in this way, it is possible to ‘mutually recognise’ (usually with exceptions) each other’s regulation so as to facilitate trade. There are precedents for mutual recognition to spread beyond simply technical measures to those measures affecting agricultural products (see, for example, the Trans-Tasman

Mutual Recognition Arrangement between Australia and New Zealand). Similarly, Australia and the EU have worked together very effectively on reducing NTBs in the context of the Australia–European Community Agreement on Trade in Wine.

The arguments against using mutual recognition centre on fears that regulatory competition can undermine public interest concerns such as health and safety standards and environmental goals, and lead to lowest common denominator outcomes or a ‘race to the bottom’. In the case of an FTA between Australia and the EU, the potential to embark on significant arrangements to mutually recognise each other’s regulatory frameworks is, arguably, very large, for three reasons. First, the underlying intent of many of the NTBs in the agricultural sector in both jurisdictions is the same: Australia and the EU have similar, very stringent, robust regulatory frameworks governing the agricultural sector. Second, the gains from cooperating on regulatory divergence accrue to both sides of the trade, particularly for NTBs in the agricultural sector. The third reason relates to the increased influence the EU and Australia would be able to exert in non-trade forums if they could cooperate more on NTBs, especially in emerging issues. If the EU and Australia—two jurisdictions with very high levels of sanitary and phytosanitary protection—were to establish common ground at an early stage in the trade of new products, they could possibly prevent NTBs from setting in. Again, cooperation in relation to wine production has been a promising case in point.

Conclusion

The ‘heat’ in the Australia–EU relationship around agriculture has lessened in recent years with reforms to the CAP and diversified markets making the trading partners much less antagonistic towards one another. Still, securing significant market access concessions in the FTA on key products such as sugar, beef and dairy is likely to be challenging. Nevertheless, there may be significant opportunities in the negotiations to overcome many of the NTBs that plague the relationship, in both the sanitary and phytosanitary and the technical barriers to trade domains. The reasons lie in the fact that Europe and Australia have strong regulatory regimes relating to biosafety and environmental sustainability and as a result both enjoy enviable reputations for clean and green agricultural sectors; both have strong institutional arrangements to ensure risk frameworks are enforced; and both would prefer to see a gradual return to the WTO for all-matters trade. And with the rise of Asia and the Middle East as export markets, politicians and bureaucrats in Brussels and Canberra have been allowed to settle into a comfortable détente, in the knowledge that they now have more in common than ever before.

That said, there have been and remain profound differences in the way the EU and Australia reconcile public policy objectives with trade liberalisation. One area that is likely to prove particularly divisive in the negotiations is that of GIs. Past FTAs, including CETA, indicate that the EU has very little motivation to concede on GIs, but Australian negotiators will need to be careful to ensure that tensions over GIs don’t scupper market access gains in other areas from being realised. The Canadians were prepared to ‘give a little’ on GIs and Australia may have to as well. In short, we are cautiously optimistic.

References and further reading

Hussey, Karen & Carl Tidemann (2017), ‘Agriculture in the Australia–EU economic and trade relationship’. In Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 97–119), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and->

Swinbank, Alan & Carsten Daugbjerg (2017), ‘The Changed Architecture of the EU’s Agricultural Policy Over Four Decades: Trade Policy implications for Australia’. In Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 77–96), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and->

AGRI-FOOD TRADE AND BREXIT

Alan Swinbank

The United Kingdom of Great Britain and Northern Ireland (the UK in this briefing) has been a member of the EU since 1973. In a referendum held in June 2016, 51.9% of votes cast were to leave the EU and 48.1% to remain. Accordingly the British Government gave formal notification of the UK's withdrawal from the EU ('Brexit'), which is scheduled to occur on 29 March 2019. Although this deadline could be extended by agreement with the other 27 EU Member States (EU27), and some legal experts argue that the UK could withdraw its Brexit notification and so maintain its EU membership, this date is of critical importance for Australian businesses trading with the UK.

What will happen on 29 March 2019?

At the time of writing the simple answer is that we do not know. Fearful of a 'cliff-edge' rupture of UK–EU27 trade flows, the two parties have been negotiating a withdrawal agreement, which would include a transition period that would extend to 31 December 2020. During this period the UK's EU membership would, technically, have lapsed; but in practice the UK would continue to apply EU policies, including its trade regime. Thus, Australia would continue to trade with the EU27 and the UK much as it does today. During the transition period the UK would be free to negotiate new trade arrangements, for example a Free Trade Area agreement with Australia, which could then come into force from January 2021.

The negotiations to determine a withdrawal agreement have not gone well, with both sides accusing the other of intransigence. Time is running out. If and when agreement is reached the deal must be approved by the European Parliament, and the UK's parliament as well. In early August Britain's trade minister, Liam Fox, suggested that there was now a 60-40% chance of the UK crashing out of the EU in March 2019 without a deal. Some hard-line Brexiteers would welcome that. It is only when the withdrawal agreement has been concluded that the EU27 and the UK can decide on their future trade partnership.

If the UK were to leave the EU without a replacement trade regime in place, on 29 March 2019 or 31 December 2020, then under World Trade Organization (WTO) rules the EU27 would have to treat imports from the UK no differently than imports from countries, such as Australia, that have not negotiated privileged access to EU markets. Likewise, the UK would be obliged to treat imports from the EU27 as third country imports. In the longer run, with appropriate customs posts and infrastructure in place, this is a manageable prospect (although potentially costly). But with little, if any, of this infrastructure yet in place, many pundits are forecasting severe disruption and congestion at these new border posts. It is not just that import taxes (tariffs) would have to be collected, but food safety and other regulatory provisions would apply, as might cabotage agreements on the number of trucks and drivers allowed across borders. Australian products, transhipped from British ports to other European destinations, or from EU27 ports (such as Rotterdam) to a post-Brexit UK, will be caught up in these delays. Tightly integrated global supply chains, reliant on just-in-time production systems, could be badly affected.

The Irish border

One major stumbling block that has stalled the withdrawal agreement negotiations is the border straddling the island of Ireland. On one side is an EU27 Member State, Ireland, and on the other an integral part of the UK, Northern Ireland. Although different tax regimes apply either side of this line on the map, goods and people can for the moment traverse it freely. The Good Friday Agreement of 1998, reinforced by the EU's Single Market, removed the armed and heavily defended crossing-points that had disfigured this border at the height of The Troubles in the 1970s, and both the UK and Irish governments—the latter supported by EU27—insist that Brexit should not result in a reinstallation of physical controls at the border.

The UK has advanced various suggestions of how this might be achieved, but the EU27 is unconvinced. Thus the

guarantee (the ‘backstop’) the EU27 is asking for is that Northern Ireland should, in effect, remain within the EU27 customs union, and continue to apply the EU27’s regulatory provisions, for the indefinite future. This proposal is anathema to the UK as it implies that the EU27’s border would separate one part of the UK (Northern Ireland) from the rest (Great Britain).

The border issue is particularly challenging for trade in agri-food and drink products. Firstly, this is because raw materials, semi-processed products, and retail packs move backwards and forwards across the border: milk from farms in the North is processed in the South; pigs reared in the Republic are slaughtered in Northern Ireland’s abattoirs; and Guinness brewed in Dublin is sent north to Belfast for bottling, before returning to Dublin for export. Secondly, this is because the EU’s Common Agricultural Policy (CAP) still maintains excessively high import tariffs on a number of farm products: this is also a longstanding bone of contention for Australia’s agri-food sector. It is barely conceivable that the EU27 would allow free importation of these products from a post-Brexit UK unless the UK in turn had promised that its external trade regime would match that of the EU27.

There are several possible forms the future UK–EU27 trade relationship could take

One possible form is that, either by accident or design, no new preferential trade arrangements are put in place. Trade between the two entities would then be governed by WTO provisions, and both parties would apply their most-favoured-nation (MFN) tariffs against one another, including trade across the Irish border. The UK would be free to negotiate FTAs with other WTO members, and would no longer need to have in place domestic regulatory provisions that matched the EU27’s—for example, relating to food safety, and plant and animal health. This would facilitate the conclusion of FTAs with, for example, Australia, Mercosur, and the USA. Moreover, the UK could unilaterally reduce, or even eliminate, its tariff barriers and amend its regulatory provisions.

The polar opposite to this is the negotiation of a UK–EU27 FTA that is almost the same as the current EU customs union, together with the UK matching the EU27’s Single Market regulations. Indeed this is basically the proposal that the British Government agreed at the prime minister’s country residence, Chequers, in July: a ‘free-trade area for goods’, with ‘a common rulebook for all goods including agri-food’. This would help ‘ensure that the UK and the EU have frictionless access to each other’s markets for goods, including agricultural, food and fisheries products, protecting the uniquely integrated supply chains and just-in-time processes that have developed across the UK and the EU over the last 40 years, and the jobs and livelihoods dependent on them’ (UK government 2018).

This proposal was quickly condemned by the government’s critics as a betrayal of Brexit—two members of the cabinet resigned—and rejected by the EU27’s negotiators as the UK’s attempt to ‘cherry-pick’ the benefits without incurring the costs and obligations of membership. Somewhat contentiously the government suggested that its proposals would ‘deliver an independent trade policy’ under which the UK would ‘be able to set tariffs for our trade with the rest of the world, and have the ability to secure trade deals with other countries.’ What margins of manoeuvre the UK would have to negotiate an FTA with Australia that differed significantly from the provisions of any future Australia–EU27 FTA is discussed further below.

Between these two extremes would lie a conventional but nonetheless ambitious UK–EU27 FTA, modelled for example on the Canada–EU Comprehensive Economic and Trade Agreement (CETA). CETA excludes some agri-food products; the concessions on others are limited by tariff rate quotas (TRQs); and rules of origin are applied to determine that European and Canadian products are eligible to benefit from CETA’s provisions. With an FTA, some sort of border dividing the island of Ireland would probably be necessary.

What scope is there for an Australia–UK FTA?

Australian agri-food interests, particularly with regard to red meats and sugar, have expressed hopes that a post-Brexit Britain will increase its imports from Australia. How realistic is this?

If a withdrawal agreement is concluded, no new trade opportunities will emerge until January 2021.

Should the UK decide it does not want to leave the EU—still unlikely, but conceivable—no new trade opportunities will open, and Australia will necessarily focus on an Australia–EU28 FTA. Similarly, should the UK agree a tight trade agreement with EU27, severely limiting the extent to which it can diverge from the EU27’s trade and regulatory regime, any Australia–UK FTA will have to knit closely with its Australia–EU27 and UK–EU27 counterparts.

Should the UK fracture its existing links with the EU27’s customs union and regulatory regime, the devil would lie in the detail. Any Australia–UK FTA would have to compete with the UK’s FTAs with the likes of Mercosur and the USA. Could Australia secure a better deal on sugar than Brazil (i.e. Mercosur)? If the UK were to use this opportunity to opt for ‘free trade’ (a unilateral reduction of tariff barriers), who would then supply the British market with sugar? Would it be the UK’s own sugar beet growers; Brazil, with shorter transport links to the UK; the EU27 with sugar processed from sugar beet benefiting from CAP support; or Queensland?

Stay tuned to this evolving saga! It has some time to run.

References and further reading

Statement from HM Government, Chequers, 6 July 2018. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF.

Swinbank, Alan (2018), ‘Brexit, Ireland and the WTO: possible policy options for a future UK-Australia agri-food trade agreement’, *Australian Journal of International Affairs* 72(4): 371-83.

Swinbank, Alan (2018), ‘Food, Farm and Rural Policies after Brexit? Some Knowns, and Known Unknowns’, *EuroChoices* 17(2): 4-11.

Swinbank, Alan & Carsten Daugbjerg (2017), ‘The Changed Architecture of the EU’s Agricultural Policy Over Four Decades: Trade policy implications for Australia’. In Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 77-96), Canberra, Australia: ANU Press. <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and->.

TRADE IN AUTOMOTIVE GOODS

Ayden O'Neill

In the context of the trade deal between Australia and the European Union (EU), the automotive industry is poised to capitalise on a number of opportunities. Currently, European exporters looking to sell in the Australian market face significant trade barriers, including 5% tariffs, a Luxury Car Tax (LCT), non-tariff barriers and complex rules of origin. Eliminating these impediments to trade will undoubtedly lead to improved access for European exporters and increased economic activity between the two parties. For Australia, a short-term loss of revenue from eliminating such barriers is likely to be made up for in other sectors such as agriculture and services. This chapter argues that a comprehensive and robust discussion of these interests in a European trade deal will be crucial to ensuring trade and investment ties reach their full potential.

For the EU, trade in automotive goods will be an issue of particular pertinence. In terms of value, passenger motor vehicles make up the EU's largest export to Australia, closely followed by medicaments and pharmaceutical products. As it stands, however, the EU faces significant competition from Asian manufacturers. Approximately 1 million new car imports were sold in Australia in 2015 from which 72% were sourced from Asia. In stark contrast, European imports made up only 11% in the same year (FCAI 2016, 2). This is due to a number of reasons. In addition to cheaper labour costs and closer geographical proximity, automotive exporters such as China, Japan and South Korea are also the beneficiaries of free trade agreements (FTAs) with Australia and have taken full advantage of improved market access.

The challenges of such competition highlight the need for similar access to Australian markets for exporters of European passenger vehicles. To be competitive in an increasingly import-oriented market, EU negotiators will be looking to eliminate as many trade barriers as possible when it comes to selling automotive goods in Australia.

On the Australian side, there is no longer a need to protect the automotive industry. The free trade deal with the EU comes at a time when the Australian automotive industry is preparing for life after domestic manufacturing. In 2017, the last remaining local manufacturers of passenger motor vehicles—Ford, GM Holden and Toyota Australia—all ceased domestic production. In the context of a European trade deal, this provides an opportunity for further trade liberalisation in an already import-oriented market. However, the Australian government is far from a position in which it welcomes all imports with open arms. In the 2016–17 financial year, import duties and the LCT generated A\$500 million and A\$630 million, respectively. In regard to the LCT, a significant proportion of the revenue generated was related to European imports: 'According to the European Commission, 90 per cent of vehicles subject to the LCT are imported and 50 per cent are from Europe' (AADA 2017, 7). Thus, an elimination or reduction of these trade barriers will affect the government's fiscal position, at least in the short term. Given the loss of the direct revenue from existing tariffs on European motor vehicles, it is expected that Australian negotiators will want to be adequately reimbursed for any concessions made, particularly in the areas of agriculture and services.

Import duties

In the context of an entirely import-oriented market, it makes little sense to continue to discriminate one import source from another. This logic is consistent with the interests of the Federal Chamber of Automotive Industry and the Australian Automotive Dealers Association, two peak bodies representing the Australian automotive industry. These associations call for the complete elimination of tariffs on imported motor vehicles from Europe which are currently set at 5%. This follows an industry-wide trend of support for further trade liberalisation. In January 2010 Australian automotive tariffs fell from 10% to 5% for countries without existing trade agreements with Australia (FCAI 2016, 2). European manufacturers with a vested interest in the Australian market express a similar sentiment. Representatives from Volkswagen, Audi, Porsche and Skoda have called for the complete elimination of the 5% tariff on their imports, arguing that the exception of tariffs for countries without trade deals causes 'disparity in the market, based on the country of origin' (Hepworth 2014). The benefits of removing these barriers to trade are evident. Within 3 years of the elimination of tariffs on Thai imports, there was an 89% increase of Thai cars in the

Australian market (Allianz 2017). With this in mind, it seems likely that the EU will push for the complete elimination of tariffs on imported European cars in Australia.

Luxury Car Tax

Discussion around import duties is also likely to spark calls for a review into the much-maligned LCT. The LCT is a tax that applies to cars with a GST-inclusive value above the LCT threshold (A\$64,132 and is imposed at 33%. For the Porsche 911 Turbo S or an Audi R8, this results in an additional A\$100,000 on top of the overall cost (Hepworth 2014). Both Australian and EU representatives from the automotive industry have criticised the measure and wish to see it abolished in any trade agreement. In the 2016 Market Access Database, the European Commission listed nine key trade barriers in Australia, with the LCT and car tariffs ranking eighth. European brands including Volkswagen, Audi, Porsche and Skoda have also expressed their concerns, suggesting that if the Australian government wants to lower the cost of cars it should abolish the 'unique' LCT (Hepworth 2014). Similarly, in a submission to the Department of Foreign Affairs and Trade, the Federal Chamber of Automotive Industry argues the LCT 'unfairly impacts predominantly European-sourced motor vehicles' and only serves to create an 'enormous degree of angst amongst consumers, dealers and distributors' (FCAI 2016, 3). As it stands, the current measures prevent a lot of Australian consumers from accessing the latest innovations in environmental and safety standards due to such high prices. Given the large number of luxury vehicles the EU exports to Australia, the controversial LCT will no doubt be a sticking point in trade negotiations.

Non-tariff barriers

While most of Australia's previous trade deals have been successful in reducing unnecessary tariffs, exporters are still met with significant 'non-tariff' barriers, which countries strive to maintain in politically sensitive sectors. For example, in Thailand in 2007—2 years after the Australian FTA came into force—the government restructured motor vehicle excise tax so that it applied to all exporters on a non-discriminatory basis. However, because rates increased according to engine size, Australia was put at a significant disadvantage, with nearly half the value of Australian car exports to Thailand made up of large 'specialised vehicles such as fire fighting vehicles and large trucks' (Productivity Commission 2010, 6). In the context of a European trade deal, the German-Australian Chamber of Industry and Commerce has identified the need to address such barriers, pointing to product standards and specifications for European vehicles:

- > Often international standards used in the EU such as the CE marking, some ISO International Standards, IEC standards and EU vehicle standards are not fully adopted and accepted in Australia (GACIC 2016).
- > Identifying and anticipating such barriers will be crucial in the negotiating stage of a European trade deal, as they evidently increase transaction costs for exporters and ultimately limit the potential benefits of trade agreements.

Rules of origin

Another issue at the centre of talks between Australia and the EU will undoubtedly revolve around 'rules of origin'. The rules of origin are criteria that 'specify the degree to which the value of a final product is produced in the exporting country' (Kang 2017, 24). With regard to motor vehicles, rules of origin are particularly relevant, with increasingly complex global supply chains and economic interdependence between countries. As it stands, many European imports are falling short of the regional value content provisions outlined in trade agreements because they contain inputs from another region, regardless of whether that source has a trade deal with Australia. For example, the Mercedes-Benz C-class has parts that are manufactured outside of Europe and regardless of a trade deal, may still be subject to a 5% tax when the final product lands on Australian shores (Hepworth 2014). Due to issues like this, the Federal Chamber of Automotive Industry supports greater reform around the rules of origin, suggesting that the agreement should prioritise the origin of a motor vehicle over its constituent parts (FCAI 2017, 4). It would also like to see a trade deal that allows the accumulation of eligible content from other countries with

which there are pre-existing trade agreements. It is therefore vital that the rules of origin in a European trade deal reflect the commercial reality of an increasingly globalised world.

Conclusions

It is clear that entering the new car market in Australia remains a considerable challenge for European exporters. Given the potential for significant economic gains, it seems unlikely that the EU will accept any trade deal that does not address the existing barriers on European motor vehicles. An elimination of import duties and the LCT, addressing non-tariff barriers and establishing more comprehensive rules of origin would lead to improved market access and all the benefits of increased economic activity. For the Australian government, such measures will likely be used as leverage items in the negotiations, potentially to improve access for agricultural exports and services.

References and further reading

- Abbott, Roderick & Hosuk Lee-Makiyama (2017), 'EU and Australia: Europe's Challenges and Policy Options for Future Trade', in Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 215-231), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and->.
- Allianz (2017), 'Australian car prices set to fall on Asian free trade deals'. Available at <https://www.allianz.com.au/car-insurance/news/australian-car-prices-set-to-fall-on-asian-free-trade-deals>.
- ATO (Australian Taxation Office) (2017), *Luxury car tax*. Available at <https://www.ato.gov.au/Business/Luxury-car-tax/>.
- AADA (Australian Automotive Dealers Association) (2017), 2017-18 Pre-Budget Submission, January 19. Available at <http://aada.asn.au/wp-content/uploads/2014/08/AADA-Submission-Pre-budget-submission-2017-18.pdf>.
- DFAT (Department of Foreign Affairs and Trade) (2017), *Free Trade Agreements*. Available at <http://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx>.
- European Commission (2018), Directorate-General for Trade 2016, *Market Access Database*. Available at http://www.madb.europa.eu/madb_barriers/barriers_result.htm?sectors=none&countries=AU&measures=none&keyBarrier=T.
- FCAI (Federal Chamber of Automotive Industries) (2016), 'FCAI submission to the Department of Foreign Affairs and Trade – Australia-European Union Free Trade Agreement'. Available at <http://dfat.gov.au/trade/agreements/aeufta/submissions/Documents/federal-chamber-of-automotive-industries-eufta-submission.PDF>.
- FCAI (2017), 'FCAI submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Australia's Trade and Investment Relationship with the United Kingdom'. Available at <http://www.aph.gov.au/DocumentStore.ashx?id=9d3342b0-c966-4556-9f42-48f8bcc1102d&subId=509620>.
- GACIC (German-Australian Chamber of Industry and Commerce) (2016), 'Invitation for Submissions Regarding Negotiations on an Australia - European Union Free Trade Agreement'. Available at <http://dfat.gov.au/trade/agreements/aeufta/submissions/Documents/german-australian-chamber-of-industry-and-commerce-eufta-submission.PDF>.
- Hepworth, Annabel (2014), 'Europe free trade agreement could put Audi and Porsche in reach', *The Australian*, 27 October. Available at <http://www.theaustralian.com.au/national-affairs/foreign-affairs/europe-free-trade-agreement-could-put-audi-and-porsche-in-reach/news-story/72e3f7840a094cdd6395a67b62430d62>.
- Kang, Yoo-Duk (2017), 'Korea-EU FTA: Breaking New Ground', in Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 19-33), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and->.
- Productivity Commission (2010), *Productivity Commission Study into the Effectiveness of Free Trade Agreements*. Submission by the Australian Industry Group, February, Canberra.

TRADE IN SERVICES

Deborah Elms – Speech given at Understanding EU Trade: Issues and Challenges Symposium, August 2018, Canberra.

Trade in services is often not well understood as services are, unlike goods, not tangible. This presents a challenge because trade in services in modern economies is where most of the current and future jobs lie. Even in manufacturing, for example, the value of this sector is increasingly captured by services. In Asia today, between 40 and 60% of most value chains are actually services: everything from cleaning services in the factory, to legal services, to logistics, to retail.

If services are not addressed properly in free trade agreements (FTAs) then much of the value of the modern economy is missed. The negotiation of services trade is a complex process as it is often mostly about domestic-level regulations. Trade in services, unlike goods, is not affected by tariffs. What stops the service from reaching another market across border are domestic-level regulations that exist in the other market. These regulations are often in the form of licensing and qualifications and they inhibit foreign services from delivering their services in that market. Thus, most negotiation of actual services trade is about behind-the-border regulatory measures.

One of the reasons trade in services has been slow to be negotiated is because it is difficult to see, difficult to measure; thus, there is a complexity in understanding how to approach the negotiations. This has been a historical problem. Prior to the internet, early negotiating of trade in services at the multilateral level was incomprehensible for negotiators as they could not understand how a service could be physically traded across borders. It was the General Agreement on Trade and Services (GATS) which was developed out of the Uruguay Round of the early 1990s that set out a framework for trade in services. The rules set out in the GATS are, by trade standards, relatively modern. However, services trade is evolving rapidly, especially in the context of cross-border services that negotiators have to try to address. Services negotiators struggle because they have to deal with the rapidly evolving situation with rules that were developed under the Uruguay Round and have never been updated in the context of the multilateral system.

In the context of an FTA, negotiators are trying to create suitable rules for an agreement without the help of an updated global 'rule-book'. For example, a common problem encountered when negotiating an FTA is to do with the movement of money as it is often not repatriated very easily. Usually in an FTA, one of the commitments in the text is about how does a company allow another company to move and repatriate money back and forth between—among other things—subsidiaries. For example, if a company from State A is setting up a hospital in State B, how does it then get the money out of the hospital back to State A? These rules are usually clearly outlined within FTAs as they were not addressed clearly in the GATS.

The GATS is the system that governs trade in services. The GATS consists of the rules, schedules for individual members and some annexes. The creators of the GATS were wary of the fact that services trade was likely to develop quite quickly, so they were cautious during the initial scheduling, and the commitments for countries under the GATS are light as a result. There was a sense among the GATS negotiators that it would be better to create at least some rules for services trade and then revisit the rules when there was increased demand for rules in services trade. This revisiting has not happened.

Unlike in goods trade, discrimination is permitted in the trade of services. Discrimination is not permitted only when two parties have made a commitment, perhaps in the form of a bilateral agreement, to be open and fair. If a state or party has made no such commitment then discrimination is permitted in services trade.

The different types of services are divided up under a classification system called 'customs procedure codes'. These codes divide the types of services into 12 broad categories, and within those, 160 sub-categories. This system is not perfect as it does not have the capacity to account for new services such as Uber and Airbnb. The rules themselves apply to measures, and measures as originally defined under the GATS can be broad.

One of the types of services often negotiated over in an FTA are government services. These relate to anything that the government procures; for example, the airlines and hotels government use when travelling. There are certain things that the government procures for itself and rarely permits foreign procurement for, and these are public goods such as public schools and hospitals. Such services are rarely open to foreign competition and are usually reserved for government and government only.

Positive and negative lists

States can approach trade in services in one of two ways: either through a positive list schedule or a negative list schedule. The FTAs negotiated in the wake of the GATS had predominately positive list schedules which outline exactly what is afforded to the other party in the agreement. In early services trade negotiations, governments tended to prefer positive lists as they knew exactly what they were affording to the other party. If the government did not include the service in the schedule, then it had no commitments. Business is not a fan of a positive list approach because it restricts access.

Within positive list schedules, a state does not automatically receive market access and national treatment; these are received only for the sectors the government chooses. There have been difficulties scheduling positive lists, because traditionally it was difficult to conceive how a service could be both divided and move across a border. The solution to this positive list schedule problem was in the form of four modes of supply defined in Article 1 of the GATS. These modes divide up services on the basis of 'who moves':

- > First mode of supply: No person moves, the service moves. Traditionally, governments would open everything or nothing under mode 1.
- > Second mode of supply: A person moves across borders to receive the service. For example, a person goes to another country to receive health care or education.
- > Third mode of supply: The service moves across borders to provide the service. This mode is commonly known as foreign direct investment.
- > Fourth mode of supply: The person moves temporarily across borders and then returns home. For example, a lecturer moves abroad to provide education and then returns to their home country.

A government can be very specific with its positive list schedules about how it grants access. For example, a government allows a bank service provider six bank branches and two ATM machines. As a result of this specific approach, governments have expressed dissatisfaction at being discriminative. Over time, governments have increasingly switched their methods to adopt a negative list schedule.

While governments have traditionally tended to prefer positive list schedules, business have preferred the negative list schedule wherein access and national treatment is granted to every sector unless specified otherwise by the government. Under negative list schedules, the government reserves the right to be out of compliance with being completely open. Government grants access to everything except to those sectors in which it wants to be restrictive, generally the most sensitive sectors. Business prefer the negative list approach because they have more opportunity.

Negative list schedules do not have the complex scheduling associated with positive lists. Every sector opens unless the government specifies otherwise. National treatment and market access are afforded unless the government specifies otherwise. A good example of the use of negative list schedules in FTAs is in the Trans-Pacific Partnership. A common problem small business encounter with negative list schedules is that because they do not see their service listed, they think that they do not have national treatment or market access. Negative lists set out the areas that cannot be accessed by foreign companies. Paradoxically, this is a violation of the 'free' trade agreement, but it is important to remember that governments reserve the right to discriminate in the trade of services.

When a government wants to be restrictive about a particular service then it will outline the violations in the negative list. As a hypothetical example, the list would outline where the trade agreement's law is being violated (section on market access), who is violating it (the government), and what domestic law it is violating (e.g. 1995 law on road vehicles). The government needs to identify what laws they are violating and not willing to change, and those that they are willing to change.

The EU's approach and opportunities for Australia

Both Australia and the European Union (EU) are likely to take a negative list schedule approach to their FTA. Up until the Canada–EU Comprehensive Economic and Trade Agreement (CETA) in 2015, the EU always used the positive list method. What is complex for the EU when using a negative list is it needs to consider reservations not just at the EU level, but also the member state level. The EU needs to identify what each Member State does in terms of providing services currently and what they will do in the future. Each restriction will sometimes have a state-by-state explanation as to why they are restricting access or national treatment. This negative list schedule is less restrictive than the positive list approach, but it is more complex to negotiate.

Most countries have both positive and negative list schedules. Usually, once a government switches its scheduling to a negative list it chooses not to return to being restrictive. Australia has negative list schedules in most of its agreements right now.

There are often measures present in the services chapter of FTAs, typically in the form of two annexes, that outline whether market access for a service can change or not. For example, the EU and Japan have an FTA which outlines each side's access to certain services. If Australia gets better access to a service than Japan did during the Australia–EU FTA negotiations, then Japan is also entitled to that better level of access. In some circumstances, these access restrictions can be renegotiated, but they do not automatically change. Moreover, FTAs also specify whether new reservations can be added in the future. In the services chapter of FTAs, there is also typically an outline of the services wherein the levels of access for foreign business do not change. These services are often the most sensitive sectors that need greatest protection from foreign competition.

Over time, FTAs have become more flexible and have shifted to a different type of scheduling for services. What is interesting is that the EU, which has always had a positive list, has changed its stance during negotiations with Canada and Japan to adopt a negative list schedule. This is important for Australia as it gets to negotiate with the EU in its new phase of preference for negative list schedules. Both Australia and the EU will be approaching their FTA in the same way and thus there will be more opportunities to be creative about how to handle the opening of the services market in both places.

References and further reading

GATS (General Agreement on Trade in Services) (1994), Marrakesh Agreement Establishing the World Trade Organization. Annex 1B. 1869 U.N.T.S. 183 I.L.M 1167. Available at https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

Kerneis, Pascal (2017), 'Gains for Trade in Services in an EU–Australia Free Trade Agreement: A European Perspective' in Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 139–162), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and>.

INVESTMENT ISSUES IN THE CONTEXT OF THE AUSTRALIA–EU FTA

Ivana Damjanovic

Chapters on investment in modern free trade agreements (FTAs) include investment protections, such as protection against expropriation and discrimination, guarantee of fair and equitable treatment, and free transfer of capital. In addition, they provide for a specific procedural mechanism, known as investor-state dispute settlement (ISDS), which allows foreign investors to bring a case directly against the country in which they have invested (host state) before an *ad hoc* independent international arbitration tribunal.

Australia has included investment chapters with ISDS provisions in its FTAs with a view to provide protections for Australian investors overseas. The Australian government considers the inclusion of ISDS provisions in FTAs on a case-by-case basis taking into account national interests. In the European Union (EU), due to the division of internal competences between the EU and its 28 Member States, investment agreements are concluded separately from FTAs and ratified by both the EU and Member States but are usually negotiated alongside an FTA. Public criticism of ISDS, which arose particularly in the context of the trade negotiations between the United States of America and the EU, led to the implementation of a proposal to move from ISDS towards an investment court system. Such an investment dispute settlement mechanism, consisting of a permanent bilateral tribunal and an appeal tribunal competent to review decisions of the tribunal, is to be included in all future EU investment agreements. Ultimately, the EU envisages the creation of a multilateral investment court for the settlement of investment disputes and is taking an active role in the ongoing global ISDS reform.

The EU negotiating mandate for an FTA with Australia, presented by the European Commission and adopted by the Council of trade ministers of 28 Member States on 22 May 2018, does not include a mandate to negotiate an investment agreement between the EU and Australia. The Member States have so far not requested from the European Commission a recommendation for a negotiating directive for an investment agreement. Consequently, a separate agreement between the EU and Australia that would include investment protections and an investment dispute settlement mechanism is currently not envisaged.

International investment is greatly relevant to both the EU and Australia. As a bloc, the EU is Australia's largest source of investment. The EU is also an important market for Australian investors. The conclusion of an investment agreement would thus be of interest to both parties. Whenever the direction of the ongoing global ISDS reform is clarified, including the possibility of the creation of a multilateral investment court as proposed by the EU, the two parties might be more inclined to embark on negotiations of an investment treaty. In the meantime, Australian investors in the EU can rely on protections available under the existing bilateral investment treaties between Australia and individual Member States (Czech Republic, Hungary, Lithuania, Poland and Romania), Member States' domestic law and EU law.

EU investment competence

With the Lisbon Treaty in 2009 investment issues have become part of the EU's external relations as foreign direct investment has been included in the scope of the Common Commercial Policy (TFEU 2009, art. 206 & 207). Consequently, the EU has gained competence for investment treaty making in the area of investment protections and investment dispute settlement, which previously fell within the scope of Member States' treaty making competence. However, the lack of clarity on the scope of the EU's foreign direct investment competence has led to disagreements between the EU and Member States. The European Commission claimed exclusive EU competence to negotiate and conclude FTAs with investment chapters without the involvement of Member States' parliaments through the ratification process. To the contrary, Member States argued that they must be involved in these agreements by ratifying them in parallel with the EU.

This conflict was resolved by the Court of Justice of the EU (CJEU) in 2017. The CJEU confirmed EU exclusive competence with respect to all key FTA areas, including foreign direct investment, meaning that only the EU, and not the Member States, would be a party to the agreement. However, the Court also identified EU and Member States' shared competence with respect to investment dispute settlement and portfolio investment or non-foreign direct investment; that is, investment of purely financial character, such as equity and debt securities, usually defined as less than 10% share ownership of the investment or an investment that does not give the investor the possibility to exercise management or influence on the management of the investment. In other words, the CJEU clarified that the EU is not exclusively competent for all investment issues.

Following the CJEU Opinion, the European Commission endorsed a new approach in trade negotiations by splitting trade and investment in two parts: an encompassing FTA which is concluded as an EU stand-alone agreement (ratified only by the EU), and a separate investment agreement as a mixed agreement (ratified by both the EU and all Member States). Both agreements are, in principle, negotiated in parallel. However, such an approach has not been endorsed with respect to Australia and New Zealand, and no separate investment agreements have been envisaged by the EU with these two countries. The European Parliament supported the split of agreements and recommended that an FTA with Australia should contain comprehensive provisions on investment liberalisation within the EU's competence, with a potential second agreement that would address investment protection and an investment dispute settlement mechanism as matters of shared competence (EP 2017).

EU international investment policy

Generally, the emphasis in EU trade and investment policy is placed on integrating investment liberalisation and investment protection. EU international investment policy aims to increase EU competitiveness and contribute to the objectives of smart, sustainable and inclusive growth, in line with the Europe 2020 Strategy (EC 2010). Investment agreements must be consistent with the other policies of the EU, including those on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy, while allowing the EU and the Member States to adopt measures necessary for achieving public policy objectives.

Against this value framework and pressured by public controversy surrounding negotiations of the EU–United States transatlantic trade and investment partnership, the EU embarked on a new approach in its investment agreements. In the focus of controversy were investment protections and ISDS, sparking a heated debate about independence of arbitral tribunals, fairness and the need to preserve the right of governments to regulate in the public interest. The public outcry against ISDS in the context of the Transatlantic Trade and Investment Partnership has driven the EU to take up a leadership role in reforming the current international investment regime on the global scale.

The EU's new approach to investment has materialised in the investment chapter of the Canada–EU Comprehensive Economic and Trade Agreement (CETA). CETA envisages a paradigmatic shift from investment arbitration to permanent bilateral tribunal adjudication, including an appellate mechanism, for resolution of investment disputes, known as the investment court system. CETA also includes more specific substantive protections for foreign investment, including an explicit reference to the right of governments to regulate in the public interest. Such improved investment protections and an investment court system are now a crucial part of the EU investment agenda. However, the future of an investment court system as a mechanism for resolution of investment disputes within the EU depends on the CJEU's determination on the compatibility of an investment court system with EU law, which has been requested by the Belgian federal government.

The EU believes that general concerns about the ISDS regime can be efficiently addressed only through a permanent solution found at the multilateral level. Ultimately, CETA includes a commitment by the EU and Canada to jointly work with other interested partners on the creation of a multilateral investment court. For the EU, a multilateral investment court would replace the bilateral investment court systems included in all EU investment agreements. In global terms, such a court would be a major departure from ISDS based on commercial arbitration. Member States have granted a mandate to the European Commission to start negotiations on the creation of a multilateral

investment court under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), which is currently debating global reform of ISDS. In the EU's view such a permanent international investment court would support the incorporation of investment rules into the World Trade Organization in the longer term (EC 2015).

Member States' national investment policies

Before 2009, EU Member States negotiated and concluded investment agreements with third non-EU countries, in so called bilateral investment treaties (extra-EU BITs). Such agreements cover both foreign direct investment and portfolio investment, and provide guarantees for foreign investors in the post-establishment stage of the investment with a recourse to ISDS. With a total of 1,165 agreements, Member States together account for almost half of the total number of BITs currently in force around the world (UNCTAD 2018). After 2009, it was envisaged that EU-negotiated investment agreements would replace the existing extra-EU BITs. Member States can still amend the existing extra-EU BITs or conclude new extra-EU BITs with third countries only if so authorised by the European Commission, in cases where an EU investment agreement is not foreseen. In contrast to EU investment agreements, post-Lisbon extra-EU BITs contain ISDS as a mechanism for the settlement of investment disputes—however, it is envisaged that a multilateral investment court could replace the existing arbitration mechanism. The current EU investment agenda will replace a part of the existing Member States' extra-BITs (with Canada, Mexico, Singapore and Vietnam)—however, the ultimate replacement of all existing extra-EU BITs with EU investment agreements can be expected only in the long term.

Australia's investment policy

Australia has ISDS provisions in six FTAs in force and two FTAs currently not yet in force. Australia also has ISDS provisions in its other 20 international investment agreements. The Australian government considers the inclusion of the ISDS mechanism in its trade and investment agreements on a case-by-case basis. For example, Australia has included ISDS in its FTAs with South Korea (2014) and China (2015) but not with Japan (2015) and the United States of America (2004). Most recently, ISDS provisions have been included in the yet to be ratified Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11).

While Australia does not have extensive experience with ISDS claims, ISDS in Australia became extremely controversial in 2011 in response to the first claim against Australia, filled by the tobacco producer Philip Morris under an old BIT between Australia and Hong Kong, challenging Australia's tobacco plain packaging legislation. While Australia won this claim on jurisdictional grounds in 2015, ISDS remains a focus of parliamentary and media debate.

With respect to the EU, Australia has BITs with five Member States:

International investment agreements in force between Australia and EU Member States (bilateral investment agreements or BITs)	Entry into force
Czech Republic	29 June 1994
Hungary	10 May 1992
Lithuania	10 May 2002
Poland	27 March 1992
Romania	22 April 1994

These agreements remain in force until replaced by an EU investment agreement with Australia. In the absence

Source: United Nations Conference on Trade and Development (UNCTAD), 2018.

of such an agreement, Australian investors in the Czech Republic, Hungary, Lithuania, Poland and Romania can rely on the investment protections and ISDS provisions under the respective BITs. Australian investors in other EU Member States can rely on protections awarded under host Member States' domestic law and EU law, enforceable before domestic courts in the case of national measures and the CJEU in the case of measures adopted by EU institutions and bodies.

Investment related provisions in the Australia–EU FTA and further prospects

The Australia–EU FTA will address issues in relation to foreign direct investment liberalisation and market access, which fall within the EU exclusive competence. These issues will be tackled within the framework of the chapter on trade in services and investment. The EU recognises openness to foreign investment as its key principle and has defended openness and cooperation in the global order. However, new policy developments as a response to globalisation challenges should be noted, including the development of EU screening rules for foreign direct investment from third countries on grounds of security and public order in cases when foreign direct investment in Member States can affect projects or programs of EU's interest (EC 2017). Australia, which already has foreign direct investment screening rules in place, has noted that its negotiating approach with respect to investment would uphold the government's right to screen investments for national interest (DFAT 2018).

Investment protections and investment dispute settlement provisions have been excluded from the scope of the FTA negotiating mandate. These issues can potentially be addressed in a separate investment agreement, pending the European Commission's proposal of such agreement and the approval by the council of ministers on the EU side. Such agreement, however, is not envisaged at the moment.

On the EU side, questions remain whether the EU's new investment court system, and thus also a future multilateral investment court, are compatible with EU law. This will ultimately be decided by the CJEU. Regardless of the Court's finding ISDS is 'dead' for the EU. This could potentially be a stumbling block for certain EU trade partners, which are strong supporters of ISDS and are opposing the prospects of an investment court system, such as Japan. In case the investment court system is incompatible with EU law, it remains unclear what kind of investment dispute settlement mechanism would be incorporated in EU investment agreements.

For Australia, ISDS remains a valid avenue for the settlement of investment disputes. Australia is playing a constructive role in UNCITRAL's debate on global reform of ISDS—however, Australia's government has not yet taken a position on prospects for the multilateral investment court. It is reasonable to expect that Australia would adopt a pragmatic plurilateral approach, allowing for different mechanisms of settlement of investment disputes in its investment agreements.

While the EU's internal investment court system and external multilateral investment court prospects are still undefined, the 'wait and see' approach with respect to an Australia–EU investment agreement is a sensible solution.

References and further reading

DFAT (Department of Foreign Affairs and Trade) (2017), *EU and Australia investment*. Available at <https://dfat.gov.au/about-us/publications/trade-investment/business-envoy/Pages/january-2018/eu-and-australia-investment.aspx>.

DFAT (2018), *About foreign investment*. Available at <https://dfat.gov.au/trade/investment/Pages/about-foreign-investment.aspx>.

DFAT (2018), *Infographic: Australia's trade and investment with the EU*. Available at <https://dfat.gov.au/about-us/publications/trade-investment/business-envoy/Pages/brexit-edition-2016/infographic-australias-trade-investment-with-eu.aspx>.

DFAT (2018), *Australia–EU Free Trade Agreement: summary of negotiating aims and approach*. Available at <https://dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/summary-of-negotiating-aims-and-approach.aspx>.

EC (European Commission) (2010), *Communication Europe 2020: a strategy for smart, sustainable and inclusive growth*, COM(2010)2020, 3 March. Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

EC (2015), *Communication Trade for all: towards a more responsible trade and investment policy*, COM(2015)497, 14 October. Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

EC (2017), *Communication Welcoming foreign direct investment while protecting essential interests*, COM(2017)494, 13 September. Available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex:52017DC0494>.

EC (2017), *Investment*. Available at <http://ec.europa.eu/trade/policy/accessing-markets/investment/>.

EP (European Parliament) (2017), *Resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, 2017/2192(INI)*. Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0419>.

TFEU (Treaty on the Functioning of the European Union) (2009), Article 206 and 207.

UNCTAD (United Nations Conference on Trade and Development) (2018), *International Investment Agreements Navigator*. Available at <http://investmentpolicyhub.unctad.org/IIA>.

TRADE AND SUSTAINABLE DEVELOPMENT CHAPTERS IN EU TRADE AGREEMENTS

Maria Garcia

While it is widely recognised that trade can have impacts on the environment and affect labour, there is no consensus as to how these two areas should be linked in trade agreements. Some developed states have argued that low labour and environmental standards can create an unfair trade advantage (Bhagwati 1995). Since the 1994 North American Free Trade Agreement's side letter on Labour, introduced to gain labour union and Congressional support for the agreement, the United States of America (USA) has included labour and environment clauses in its trade agreements. The approach of the USA and Canada is to include clauses that explicitly prevent the lowering of domestic labour/environmental standards to gain a trade advantage, and that commit the parties to implement their domestic laws in this area. These clauses are enforceable and subject to the dispute settlement mechanism of the trade agreement. Other states, however, argue that only trade matters should be included in trade agreements, and that other issues should be dealt with in other forums. One such forum is the International Labour Organization (ILO), which encourages states around the globe to sign up to its agreed conventions regarding labour standards, especially the Fundamental Conventions on Labour Standards.

How does the EU incorporate labour and environmental matters in its trade policy?

The European Union's (EU) trade policy has encouraged the promotion of ILO standards, especially the Fundamental Conventions since their inclusion in the 1990s in the EU's Generalised System of Preferences. This system affords unilateral preferential access to the EU market to a series of products from developing states. States can gain even better terms of market access if they accede to the Generalised System of Preferences Plus system. To do so they must agree to ratify and implement the ILO Fundamental Conventions. Breaches of these standards can result in suspension of preferential access to the EU market (Portela & Orbie 2014).

When the EU designed its policy for modern trade agreements, including with developed economies, in 2006, it included provisions for labour and environmental chapters, but took a different approach to that of the Generalised System of Preferences and to US practices.

The EU designed a Trade and Sustainable Development chapter, which encourages the parties to accede to the ILO Fundamental Conventions and to ensure domestic laws comply with these, as well as to a series of multilateral environmental agreements. It commits the parties to ensuring their domestic legislation upholds key ILO labour standards regarding:

- > the freedom of association and the effective recognition of the right to collective bargaining
- > the elimination of all forms of forced or compulsory labour
- > the effective abolition of child labour, and
- > the elimination of discrimination in respect of employment and occupation.

The chapter prevents the lowering of standards to gain a trade advantage. Unlike the US model, these chapters are excluded from the general dispute settlement mechanism of the preferential trade agreement. Instead a specific dispute settlement mechanism is created, which follows the ILO promotional model of naming and shaming. The chapter includes the following guidelines:

- > Parties will consult with each other and try to resolve matter.
- > If the consultations fail, a party can convene the trade agreement's trade committee to resolve it.
- > If no agreement can be reached within 75 days of convening the committee, the concerned party can request to convene a panel of experts to deal with the case.

- > A panel of three experts is established from a list of experts agreed by the parties.
- > The panel issues an interim report, and the parties may submit comments on this. The panel issues a final report with recommendations.
- > Parties discuss recommendations to be implemented, inform domestic advisory groups, and the Trade and Sustainable Development Sub-committee monitors progress of implementation.

The expectation is that the shamed party will undertake the recommended reforms and that continuous monitoring through the Trade and Sustainable Development Sub-committee will lead to reforms. However, there is no official legal mechanism to ensure enforcement.

These chapters also rely on information exchanges, cooperation activities and discussions, and place a strong emphasis on monitoring. The chapters create a Sub-committee on Trade and Sustainable Development tasked with meeting annually and reporting back to the joint committee created by the trade agreement. Civil society is also given a specific role under these chapters to support the monitoring process. This occurs in two ways: 1) through their participation in dedicated domestic advisory groups within each of the parties which should report on the labour/environmental situation on the ground and the impact of the trade agreement on these, and 2) through the participation of domestic advisory group members and other members of the public in the civil society dialogue that follows the annual meetings of the Sub-committee on Trade and Sustainable Development.

Why does the EU incorporate Trade and Sustainable Development chapters in trade agreements?

The inclusion of these chapters is important for the EU for various reasons. Firstly, the European Parliament, which must vote in favour of a trade agreement to ensure its ratification, has positioned itself in favour of the linkage of trade to labour and environmental standards. Although not all parties within the European Parliament agree, in a 2011 resolution on human rights and environmental standards in trade agreements, the European Parliament advocated:

- > the introduction of a complaints procedure open to the social partners
- > the possibility of appeal to an independent body to settle disputes relating to social and environmental problems speedily and effectively, such as panels of experts selected by both parties on the basis of their expertise in human rights, labour law and environmental law, and whose recommendations would have to form part of a well-defined process, with implementing provisions, and
- > recourse to a dispute settlement mechanism on an equal footing with the other parts of the agreement, with provision for fines to improve the situation in the sectors concerned, or at least a temporary suspension of certain trade benefits provided for under the agreement, in the event of an aggravated breach of these standards (EP 2011).

This was particularly important in the context of negotiations with developing states, and states with chequered pasts in labour standards (Colombia, India) that had begun in 2007. Additionally, the European Economic and Social Committee, trade unions and other civil society organisations have also positioned themselves in favour of more stringent clauses. However, there are also some Member States that object to a sanctions-based model that could be used against the EU to target certain practices in other Member States.

Implementation and evolution of Trade and Sustainable Development chapters

The chapters incorporated in trade agreements fell short of some of these societal demands. Moreover, the implementation of these chapters and the level of engagement and quality of participation of civil society and issues discussed in the meetings of the Trade and Sustainable Development Sub-committees varies between trade agreements. In some cases concerns have been raised about the lack of independence of the societal

representatives in the domestic advisory groups from their government; in others, members of these groups were unaware of their role and purpose (Orbie et al. 2016). EU trade agreements have been evolving in the wording of the chapter on Trade and Sustainable Development, and in the latest ones with Canada and Japan, for instance, there is specific wording suggesting that while each party may use existing groups for consultations with civil society, these must include independent representation of labour, employers and environmental groups.

It is unclear what the precise impact of these chapters is. To date, there has been no case of a dispute brought forward. The types of issues that have been discussed at the annual Trade and Sustainable Development Sustainability Sub-committee meetings include delays in accession to ILO Fundamental Conventions (South Korea–EU), problems with implementation of ILO standards in EU Member States (South Korea–EU), updating on legal changes taking place to implement international conventions, discussions on how to cooperate on creation of sustainable supply chains and corporate social responsibility (Central America–EU) (EC 2018). Within the Peru/Colombia–EU Trade Agreement, civil society groups in the domestic advisory group have raised specific issues such as complaints over how mining impact assessments were being carried out—however, these matters were not taken up for consultation between the parties (Garcia 2016, 39).

Proposals for reform of the Trade and Sustainable Development chapters

In July 2017, the European Commission launched a non-paper to start a formal discussion for reform of the Trade and Sustainable Development chapters. It proposed two options: 1) improving the implementation of chapters, and 2) following the US model of chapters linked to financial sanctions.

Following extensive consultations, the European Commission determined there is insufficient consensus to move to a sanctions-based system, and has proposed a number of reforms as a way to improve the implementation of these chapters (EC 2018). The reforms focus on working closely with the European Parliament, Member States and international organisations; giving civil society and social partners a greater role in implementation; and encouraging early sign-up to international commitments and the close monitoring of these commitments. Transparency and communication are proposed to improve the implementation of the chapters.

Implications for Australia

Australia is not a *demandeur* of social chapters in trade agreements, although it has agreed to labour and environment chapters in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and recent trade agreements such as the one with Peru. Given the European Parliament's insistence on these chapters, and the EU's interest in ensuring some degree of consistency across its trade agreements, a chapter on Trade and Sustainable Development (or a chapter on labour and a chapter on environment, as in the Canada–EU trade agreement CETA) is to be expected. As Australia already upholds international standards, the chapter would not impose domestic legal changes. The monitoring procedures, however, will result in an additional forum for discussion and reporting on implementation of international commitments, and the specific requirements for civil society participation can create additional channels for civil society to relate their experiences and potentially flag matters that concern them.

The Australian Department for Foreign Affairs and Trade provides avenues for stakeholder participation in consultations on trade agreement negotiations, and engages stakeholders to understand issues arising from trade agreement implementation. The Trade and Investment Policy Advisory Council provides for a biannual dialogue with 15 business representatives on trade and investment policy. However, Australian trade agreements lack a specified mechanism for civil society participation in the monitoring of agreements, unlike EU trade agreements. The Trade and Sustainable Development chapter will include provisions for the establishment of domestic advisory groups, and in line with the text in CETA, and the proposed reforms detailed above, is likely to specify that the social partners must be represented in the group. This will require setting up a specific group to monitor the agreement with non-business representation.

References and further reading

Bhagwati, Jagdish (1995), 'Trade liberalisation and 'fair trade' demands: addressing the environmental and labour standards issues', *World Economy* 18(6): 745-759.

EC (European Commission) (2018), Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the Korea-EU FTA. Available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157105.PDF.

EC (2018), Non-paper: Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26 February. Available at http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

EC (2018), Report to the Civil Society Forum of the Fourth Meeting of the Board of Trade and Sustainable Development Association Agreement between Central America and the European Union. Available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157105.PDF.

EC (2018), *Sustainable Development Goals*. Available at https://ec.europa.eu/info/strategy/international-strategies/global-topics/sustainable-development-goals_en.

EP (European Parliament) (2011), Resolution of 27 September 2011 on a New Trade Policy for Europe under the Europe 2020 Strategy, 2010/2162(INI). Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0412>.

Garcia, Maria (2016), EU Trade Relations with Latin America: Results and Implementation of Peru/Colombia Trade Agreement, *European Parliament*. Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/534992/EXPO_STU%282016%29534992_EN.pdf.

Orbie, Jan, Deborah Martens, Myriam Oehri & Lore Van den Putte (2016), 'Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements', *Third World Thematics: A TWQ Journal* 1(4): 526-546.

Portela, Clara & Jan Orbie (2014), 'Sanctions under the EU Generalised System of Preferences and foreign policy: Coherence by accident?' *Contemporary Politics* 20(1): 63-76.

United Nations Conference on Trade and Development (2018), *Trade and the Sustainable Development Goals*. Available at <https://unctad.org/en/Pages/DITC/Trade-Analysis/TAB-Trade-and-SDGs.aspx>.

BREXIT AND REGULATORY COOPERATION IN THE AUSTRALIA–EU FTA

Pierre van der Eng and Donald Kenyon

Non-tariff barriers

Since the General Agreement on Tariffs and Trade (GATT) negotiations concluded in the early 1990s with the creation of the World Trade Organization (WTO) and reduced import tariffs on manufactures to an average of 3–4% in Organisation for Economic Co-operation and Development (OECD) countries, behind-the-border non-tariff barriers (NTBs) have become the main remaining restrictions on international trade flows in goods and services.

These NTBs are the trade-reducing effects of diverging domestic policies. These include national regulatory requirements such as product standards on goods, certification, licensing procedures on goods and services and professional qualifications on traded services. Such requirements frequently differ from country to country and often act as trade restrictions, whether intended or not.

An important aim of negotiations about new free trade agreements (FTAs) is increasingly to remove the NTB effect of these domestic policies to the greatest extent possible and thus expand trade opportunities. Removing NTBs is part of the new trade agenda, which also encompasses other domestic policies impacting on trade—notably investment, public procurement and competition policies.

Removing NTBs has to be part of FTA negotiations, as the rules of the multilateral WTO have not kept pace with the capacity of regulatory NTBs to restrict trade. The negotiations that created the WTO made efforts to bring NTBs into the multilateral trade rules. For example, the Technical Barriers to Trade Agreement and the Agreement on Sanitary and Phytosanitary Measures also came into force with the WTO.

Nevertheless, the ‘domestic regulation’ provisions of these agreements exhort WTO members to ensure only that technical regulations do not ‘constitute unnecessary barriers to trade’ or shall not ‘be more restrictive than necessary’. Each of these agreements also encourages members to seek equivalence or mutual recognition solutions to regulatory NTB problems, but they do little more. WTO rules disciplining NTBs have not been updated since the 1990s and now need strengthening.

Mutual recognition to resolve NTBs in the Australia–EU FTA

In *Australia and the EU: Partners in the New Trade Agenda*, Kenyon and van der Eng (2017) argue for a mutual recognition approach to liberalising the trade-restrictive effect of regulatory divergences in the negotiations for an FTA between Australia and the European Union (EU). Both the EU and Australia have considerable experience with mutual recognition in dealing with the trade restrictions of regulatory divergences.

Mutual recognition works in circumstances where there may be regulatory differences, but where there is also a high level of equivalence of regulatory intent and where there is a high level of trust in regulatory integrity. In effect, mutual recognition achieves acknowledgement that goods made to the standards, or marketed to the certification or licensing provisions of country A, may be freely traded in country B, and vice versa. By granting recognition to the technically divergent regulations of another jurisdiction, the certifying state effectively acknowledges that the regulations reach acceptable standards.

The 1979 ‘Cassis de Dijon’ judgment of the European Court of Justice established the important principle that goods lawfully produced in one EU Member State cannot be banned from sale in another Member State. This principle has been important for the EU in constructing its Single Market in the early 1990s.

Australia applied the same principle to differing product standards across the six states of Australia in the Mutual Recognition Agreement of 1993. It extended this principle to the 1997 Trans-Tasman Mutual Recognition Arrangement with New Zealand, which also included a mutual recognition of professional qualifications.

This agreement was the first FTA to apply mutual recognition internationally. As we indicate below, there is every reason why there should be others.

When it came to bringing services fully into the Single Market in the 2000s, EU membership had increased. In this larger EU, there was not the same trust in regulatory integrity across all Member States. It became clear that a mutual recognition approach to creating a single market for services could not just simply be applied across the larger bloc without further confidence building.

Nevertheless, mutual recognition was the basis for the solution reached in the EU's 2006 Services Directive in the form of 'managed mutual recognition'. In effect, the directive established a prior step to mutual recognition, known in the EU as 'Mutual Evaluation'. This is a process of transparency and peer review between Member States aimed at increasing equivalence and confidence as a stepping stone to mutual recognition in order to bring traded services fully into the Single Market (McNaughton & Lo 2017).

Thus, the extensive experiences of both Australia and the EU with mutual recognition in liberalising the trade restricting impact of regulatory divergences both internally (between Australian states and between EU Member States) and internationally (between Australia and NZ in the Trans-Tasman Mutual Recognition Arrangement place Australia and the EU in a strong position to pursue mutual recognition solutions to regulatory NTBs on goods and services in the Australia–EU FTA negotiations.

Both Australia and the EU have well-developed regulatory standards, enjoy high equivalence of regulatory intent, and share a high level of trust in each other's regulatory capacities. The latter is evidenced by 'conformity assessment' agreements that are currently in force to test for each other's standards. To the extent that any of the above elements may need reinforcing, the transparency/peer review process contained in the 2006 Services Directive could provide a stepping stone to mutual recognition solutions.

Brexit: a catalyst for mutual recognition in FTAs

Moreover, the outcome of the negotiations between the United Kingdom of Great Britain and Northern Ireland (UK) and the EU about the UK's withdrawal from the Treaty on European Union ('Brexit') may add further substance to this argument. There is still uncertainty whether the UK will settle for a negotiated or a hard Brexit by March 2019. But the British prime minister has in 2018 given two indications of how UK–EU relations may shape up.

Firstly, in a speech on 2 March 2018 (UK, 2018a) Prime Minister May specified that the UK must avoid: (1) damage to the 'integrated supply chains' that are now essential to trade in manufactures between the UK and the rest of Europe, (2) re-establishment of 'customs and regulatory checks' between the UK and Europe, and (3) creation of a 'hard border' between Northern Ireland and the Republic of Ireland. She concluded that the only way to realise these aims would be through a 'comprehensive system of mutual recognition' between the UK and the EU.

The logic of this conclusion appears incontestable. After Brexit, import tariffs between the UK and the EU will remain reduced to zero under a bilateral FTA, maybe except agriculture. But without a mutual recognition approach, regulatory NTBs could arise again to hamper UK–EU trade.

A post-Brexit trade relationship that deals with regulatory barriers through mutual recognition will be consistent with the objectives of the Trans-Tasman Mutual Recognition Arrangement to eliminate regulatory trade barriers between close trading partners. This should be the aim of all trading partners who share high regulatory standards, capacity and equivalence of intent as they move towards greater trade liberalisation in a manner that will reinforce disciplines on regulatory NTBs adopted with the establishment of the WTO.

In her speech, Britain's prime minister made a number of other specific points to demonstrate why mutual recognition is the preferred route for dealing with regulatory NTBs. She noted that the UK's 'regulatory standards will remain as high as the EU's' and will 'remain substantially similar'. This is not a commitment to harmonisation, but to equivalence. In any case, the UK would be starting from a situation of full regulatory integration with the EU. An explicit commitment to mutual recognition would make it unlikely to stray far in regulatory differences.

The prime minister's speech also indicated an expectation that 'regulators on both sides' would be involved in monitoring any post-Brexit modifications. This transparency, together with use of the peer review mutual evaluation process now available from the EU Services Directive, should provide sufficient confidence that close equivalence of regulatory intent will remain between the UK and the EU.

Prime Minister May also noted that a post-Brexit trade arrangement, which includes mutual recognition on regulatory provisions, will permit cooperation 'deeper than in any other existing trade agreement' the EU has. This is important, as it is true that without liberalisation of regulatory trade barriers, the value of any FTA to liberalising trade between partners will always be severely curtailed. This is increasingly the case as such NTBs become more important than traditional trade restrictions such as tariffs and quotas. As noted, regulatory NTBs emerged as the main restriction on global trade. The liberalisation of NTBs is central to continued economic integration and prosperity.

Secondly, a UK government White Paper of 12 July 2018 provides some further detail of how the UK government sees post-Brexit UK–EU trade relations (UK 2018b). In line with the UK Prime Minister's speech, the paper confirms the intention to move towards more 'harmonisation' with existing EU standards. It introduces the new concept of the 'common rulebook' for goods, 'covering only those rules necessary to provide for frictionless trade at the border—meaning that the UK would make an upfront choice to commit by treaty to ongoing harmonisation with the relevant EU rules' (UK 2018b, 8). For broader regulatory requirements, equivalence or mutual recognition agreements will continue to apply.

The paper does not specify all rules to be covered by either approach. With respect to agricultural products, it clearly states that 'animal and plant health (sanitary and phytosanitary)' standards are to be considered in the first category, while 'product descriptions and labelling regulations' would be in the second category (UK 2018b, 23). Without going into details here, the paper makes similar distinctions in relation to manufactures.

Conclusions

The UK is now clearly pointing to a mutual recognition solution to avoid the re-emergence of regulatory NTBs in UK–EU trade following Brexit. Mutual recognition is the most 'trade friendly' solution. It will foster deeper UK–EU economic integration than possible in a trade arrangement focused primarily on tariff elimination.

The EU's 2006 'Global Europe' communication on trade policy stated that the EU was committed to future FTAs that build on the GATT rules 'by going further and faster in promoting openness and integration'. Future FTAs, it said, 'must be comprehensive in scope, provide for liberalisation of substantially all trade and go beyond WTO disciplines. The EU's priority will be to ensure that new FTAs ... serve as a stepping stone not a stumbling block for multilateral liberalisation' (EU 2016, 8).

A post-Brexit UK–EU trade arrangement that includes mutual recognition on regulatory barriers will achieve that aim. An appropriately designed surveillance and arbitration mechanism within the overall arrangement could monitor its application, possibly through recourse to arrangements modelled on the transparency and peer review procedures in the EU Services Directive.

An FTA between Australia and the EU that also encompasses mutual recognition of regulatory divergences on conditions similar to those that can be worked out for the UK could be equally liberalising and also play a positive role in realising the aims of 'Global Europe'.

References and further reading

European Union (2006), 'Global Europe: Competing in the World'. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006DC0567>.

Kenyon, Donald & Pierre van der Eng (2017), 'Australia and the EU: Partners in the New Trade Agenda' in Elijah,

Annamarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 257-276), Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and>.

McNaughton, Anne & Jacqueline Lo (2017), 'Mutual Evaluation: A New Policy Tool for Dealing with 'Behind the Border' Barriers' in Elijah, Annmarie et al. (Eds.), *Australia, the European Union and the New Trade Agenda*, (pp. 163-184) Canberra, Australia: ANU Press. Available at <https://press.anu.edu.au/publications/series/australia-and-new-zealand-school-government-anzsog/australia-european-union-and>.

UK (United Kingdom) (2018a), 'PM Speech on Our Future Economic Partnership with the European Union.' Available at www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union.

UK (2018b), 'The future relationship between the United Kingdom and the European Union.' Available at <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>.

GLOSSARY

anti-dumping – under the 1994 WTO Anti-Dumping Agreement, signatory countries can take retaliatory actions in substantiated cases of an exporter selling goods below the home market price or cost of production

behind-the-border trade barriers – measures that are not tariffs but restrict or impede international trade, such as labelling requirements, environmental regulations and rules of origin

bilateral investment treaties – agreements establishing the terms and conditions for private investment by nationals and companies of signatory countries. See also foreign direct investment

Brexit – the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union

change in tariff classification – pertaining to rules of origin, a product that has undergone significant transformation and as a result changed tariff classification is said to have originated in the country where that transformation occurred

Common Agricultural Policy (CAP) – the EU's agricultural policy

Doha Round – since 2001, the current round of multilateral trade negotiations to lower trade barriers under WTO auspices

duties – taxes levied on the import or export of goods

EU Single Market – a single market of EU member countries based on arrangements that seek to guarantee the free movement of goods, capital, services and people

foreign direct investment (FDI) – investment flows by companies between countries for the purpose of establishing controlling ownership in a business enterprise in a host country

geographical indications – specifications of the geographical origin or products as indications of their quality or reputation

intellectual property – intangible property of the mind

International Labour Organization – a forum that encourages states to conform with conventions regarding labour standards

investor-state dispute settlement – a procedural mechanism that allows foreign investors to bring a case directly against the country in which they have invested before an ad hoc independent international arbitration tribunal

most favoured nation (MFN) treatment – the principle that signatories to WTO agreements cannot discriminate between other signatories and are required to give all those trade partners equal treatment

multilateral(ism) – multiple countries cooperating on a given issue

mutual recognition agreement – agreement by which two or more countries agree to accept each other's divergent technical standards on products or services mutually traded

mutual recognition of professional qualifications – agreement under which two or more countries agree to accept divergent technical requirements on mutually traded professional services

negative list – listing of sectors that retain restrictions in free trade agreements, or a listing of economic sectors that remain prohibited or restricted for FDI in investment agreements; non-listed sectors are unrestricted

new trade agenda – or 'deep trade agenda', refers to new and growing trends in international business, such as internationalisation of supply chains, growth of services trade, FDI and liberalisation of non-tariff trade barriers

non-tariff barriers – trade-reducing effects of domestic policies

positive list – listing of sectors that open to foreign trade in free trade agreements, or a listing of economic sectors that are open to FDI in investment agreements; non-listed sectors remain restricted

protectionism – economic policy of limiting international trade through, for example, tariffs on imported goods, restrictive quotas and a variety of non-tariff trade barriers

rules of origin – criteria needed to determine the country of origin of a product

sanitary and phytosanitary measures – measures to protect humans, animals and plants from diseases, pests or contaminants

tariff – trade policy instrument, a tax imposed on imported goods and services

tariff rate quota – trade policy instrument, a higher tariff is imposed on imported goods beyond a quota threshold

test data – data relating to a drug's quality, safety and efficacy, as well as its physical and chemical characteristics

trade liberalisation – removal or reduction of national restrictions or barriers on the international exchange of goods and services

Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement – 1994 international agreement under the WTO setting minimum standards for intellectual property regulation applying to nationals of other WTO member countries and bringing TRIPS issues into the purview of WTO dispute settlement procedures

Trans-Tasman Mutual Recognition Arrangement (TTMRA) – non-treaty agreement between Australia and the Australian states, and New Zealand covering sale of goods and mutual recognition of divergent goods standards and professional qualifications

Uruguay Round – 8th round of multilateral GATT negotiations (1986–1994) comprising 123 countries and resulting in several agreements to reduce trade barriers on goods and services and establish WTO

APPENDIX: INDUSTRY AIMS IN RELATION TO AN AUSTRALIA–EU FTA

Submission	Industry	Tariffs	NTBs
Accord	Manufacturing/ raw materials/ services	Free trade for products and raw materials already in commercial use	Mutual recognition of industrial chemicals and formulated products; Australian compliance with Trusted International Standards Policy
ANCA Group	Manufacturing/ services	Currently faced with duties between 0.5% and 4%; supports free trade	N/A
ANZ	Services and investment	N/A	Improved ability of non-EU banks to operate across the EU; better process for resolving disputes around standards of agricultural products; higher monetary threshold for the Foreign Investment Review Board review to investors from the EU
Australian Council of Trade Unions	Services and investment	N/A	Greater transparency/input from civil society; maintenance of domestic labour market testing laws; labour rights chapter; no ISDS provisions
Australian Dairy Industry Council	Agriculture and food products	Improved market access and reduced tariff for Australian dairy products into the EU	Removal of unnecessarily technical market access requirements; recognition of trade imbalance in dairy products between Australia and the EU; proper protection of GIs outlined under the WTO's Agreement on Trade in Intellectual Property
Australian Fair Trade and Investment Network	Services and investment	N/A	No ISDS provisions; no extension of monopolies on patents and copyrights; positive list for services; public services excluded; right to regulate to meet service standards and public interest; adoption of international standards on labour rights; government–government dispute process, no extension of temporary movement of workers (excluding senior executives and managers)

Australian Food and Grocery Council	Agriculture and food products	Complete elimination of tariffs for Australia's agri-food exports	Adhering to WTO obligations around quarantine and food safety measures; improve framework for two-way investment flows, services and movement of people; support common food names while providing for GIs under WTO agreements; commitment to multilateral trade reform to eliminate EU farm subsidies
Australian Forest Products Association	Manufacturing	Equity in reduction of tariffs and their timing	Full access to trade remedies under the WTO (anti-dumping, countervailing measures); maintain the ability to apply technical regulations, standards, testing and certification; maintain the right to apply rights and obligations under the WTO with regard to SPS and TBT; review of FTA market access outcomes
Australian Wine and Grape Authority	Agriculture and food products	Elimination of tariffs for Australian wine and grape concentrate	N/A
Australian Pork Limited	Agriculture and food products	N/A	Ensure any agreement does not undermine Australia's science and risk-based biosecurity arrangements (the pork Biosecurity Import Risk Assessment); consider the current uneven playing field (e.g. lack of protocols, quotas, establishment accreditation)
Australian Steel Institute	Manufacturing	N/A	A clause which states that SMEs are not affected by any provisions relating to government procurement; the Article dealing with the content of tender documentation reflects the structure of the TPP (i.e. remove any doubt that criteria can be listed in order of relative importance)

Council for International Trade and Commerce South Australia	N/A	Review import duty restrictions	Centralised trade and tender platform to allow SME to manufacture/supply into large scale builds in Europe; funding of Incorporated Chambers to facilitate networking and trade initiatives; more accessible visa options; 'streamlining' of standards in the workplace; mutual recognition of conformity assessments and certification; commitment to International Labour Organization standards and Universal Declaration of Human Rights; consideration of GIs; review of double taxation laws
Dr Remy Davison (Monash University)	N/A	N/A	Policy transfer; technical harmonisation of product and food labelling standards; harmonisation of rules of origin; harmonised market access regimes; should reflect WTO-plus liberalisation objectives fostered by the TPP
Export Council of Australia	N/A	Eliminating/reducing tariffs	Harmonise standards across countries and develop mutual recognition agreements; Australia making more use of the mechanisms to resolve trade disputes; supports the proper protection of GIs under the WTO Agreement while ensuring the ongoing use of common food names (as in the TPP); one set of rules of origin; a mutual recognition agreement to cover all Authorised Economic Operator Programs existing in member countries; inclusion of an ISDS provision; an 'Investment Court' system (as in CETA); a commitment to return to the WTO to reduce and eliminate farm subsidies
Federal Chamber of Automotive Industries	Manufacturing	Elimination of tariffs and Luxury Car Tax	Review inconsistent rules of origin
Ford Motor Company of Australia Ltd.	Manufacturing	Elimination of tariffs on imported new vehicles and parts	Eliminate potential for currency manipulation

German-Australian Chamber of Industry and Commerce	N/A	Elimination of import duties; Luxury Car Tax; wine equalisation tax	Relaxing of visa rules with appropriate work rights in Australia; mutual recognition of qualifications and skills; alignment of product specifications with international standards; review country of origin rules; risk-based approach to quarantine based on country of origin principles; review of foreign investment rules (less bureaucratic)
Dr Umair Ghori (Bond University)	Services and investment	N/A	'Carve outs' for ISDS claims based on expropriation
Grain Growers	Agriculture and food products	The removal of all tariffs and quotas on all grains and grain products	Minimise the risk of technical requirements after tariff removal; built-in review clauses (MFN type status) and mechanisms to resolve SPS disputes without compromising Australia's biosecurity
Law Council of Australia	Services and investment	N/A	Equal levels of access for lawyers between both countries; mutual recognition of qualifications; include provisions to guide further liberalisation of legal services markets
Michael Monaghan	Services	Tariff free access	Freedom of movement and right to live, work, study and travel; reciprocal health cover and social welfare; easier access to citizenship for Australians with ancestral ties to Europe
Montessori School Murcia	Services	N/A	A program for the mobility of teachers and students at all levels, facilitating the opening of Australian international schools with Montessori-based curriculums overseas
National Farmers' Federation	Agriculture	Tariff free access	Consideration of the impact of the CAP; support of the proper protection of GIs under the WTO's TRIPS agreement; science-based approach to biosecurity protecting Australia from pests/disease

Portuguese Australian Chamber of Commerce	N/A	Reduction of tariffs on footwear imports	Establish a double Tax Agreement with Portugal
Prof Gonzalo Villata Puig (Chinese University of Hong Kong)	Services and investment	N/A	Remove the agricultural tariffs and quarantine requirements and harmonise the regulatory divergences in goods and services
Prof Gonzalo Villata Puig & Prof Bruno Zeller (University of Western Australia)	Agriculture, services and investment	Reduction of tariffs	Address regulatory divergences in agriculture and biosecurity without losing sight of health issues and environmental protection; investment facilitation
Public Health Association of Australia	N/A	N/A	No ISDS mechanism; IP: oppose provisions to expand the scope of patentability; reject proposals to extend data protection; reject provisions for patent term extensions; oppose strong enforcement measures including the seizure of suspected IPR infringing medicines in-transit; transparency and independent analysis of FTAs
Qantas	Services	Alignment of duty to EU's MFN rates	Further expansion of Working Holiday Visa and Work and Holiday visa arrangements; transparent biosecurity requirements
Red Meat and Livestock Industry Taskforce	Agriculture	Significant improvements to market access in agriculture (tariffs, quotas)	N/A
Regional Development Australia	Agriculture	N/A	Resist attempts by the EU to quarantine the use of the name 'Prosecco' to a geographic area in Italy
SunRice	Agriculture	Reduction of tariffs and quotas	N/A

Telstra	Services and investment	N/A	No change to settled regulatory principles in Australia; mobile roaming provisions (as in TPPA); the inclusion of an IP Chapter; the flexibility to move key employees between jurisdictions (further extension of the 5-year UK Working Visa); cross-border data transfer subject to appropriate protections (see Article 14.11 in the Electronic Commerce chapter of the TPPA)
United Commonwealth Society	N/A	N/A	Revitalise the Commonwealth; focus on trade ties; establish an annual meeting of Commonwealth nations
Victorian Government Department of Economic Development, Jobs, Transport and Resources	N/A	Request MFN treatment across EU; reduce barriers for food, beverages and manufactured goods	Expanding services linkages and investment ties; enhancing regulatory cooperation; promoting mutual recognition and improving harmonisation of processes and technical requirements; transparent and easy-to-use format
Winemakers' Federation of Australia	Agriculture and food products	Tariff reductions for wine	Bilateral wine agreement overcomes most non-tariff measures; however, any FTA should not allow the extension of GIs to grape varieties (Prosecco) or provide additional protection for European traditional terms

Source: Department of Foreign Affairs and Trade (DFAT) (2018).

CONTACT US

**The Australian National University
Centre for European Studies (ANUCES)**

1 Liversidge Street, Building #67C
Canberra ACT 2601
Australia

T +61 2 6125 9896

E europe@anu.edu.au

W <http://ces.anu.edu.au>

CRICOS Provider #00120C